THE NATIONAL LAW REVIEW

Forest Park Medical Center and the Travel Act: Different Road, Same Destination

Article By
David J. Edquist
Daniel Balk III
Stacy C. Gerber Ward
von Briesen & Roper, s.c.
Health Law

- Biotech, Food, Drug
- Health Law & Managed Care
- Litigation / Trial Practice

- Texas

Tuesday, April 23, 2019

Introduction

Healthcare fraud convictions are news. When the convicted parties are physicians, investors and staff of a physician-owned surgical hospital who now face up to sixty-five years in a federal penitentiary, that is big news. And when some of those convictions were based, in part, on a relatively obscure federal law that appears to expand the reach of federal prosecutors to include commercial and private-pay business that many assumed would fall outside of federal jurisdiction, that really has the industry buzzing.

The case in point, involving Forest Park Medical Center ("FPMC"), is not as earth-shattering as some make it out to be, however. To be sure, this case is a wake-up call for providers who believe that they can avoid liability under federal fraud and abuse laws if they do not accept Medicare or Medicaid patients or otherwise carve out federal program beneficiaries. But it also serves as a reminder that sham arrangements that are intended to compensate physicians to steer patient referrals invariably place the participants at risk of prosecution. This *Legal Update* explores the background to the *Forest Park* case and the state and federal statutes upon which the prosecutors relied, and then discusses key implications and takeaways for reviewing existing contractual relationships and internal compliance programs in response to these developments.

The *Forest Park* Case

FPMC is a physician-owned surgical hospital established in 2009 in Dallas, Texas. In December 2016, the United States Department of Justice announced the unsealing of an indictment[1] of twenty-one FPMC founders and investors, other hospital executives, and physicians, surgeons and others affiliated with the hospital in a case called *United States vs. Beauchamp, et al*. (referred to in this *Legal Update* as *Forest Park*).[2] DOJ asserted a three-pronged conspiracy designed to: (1) maximize reimbursement by refusing to join insurance plan networks, (2) maximize patient volume by paying bribes and kickbacks to physicians in exchange for referrals to the hospital, and (3) hide the scheme by laundering the kickback/bribe money through sham business ventures. The indictment specifically alleged as follows:

- To maximize reimbursement, FPMC refused to join networks of insurance plans for a period of time after opening. Because it was out-of-network, FPMC was able to set its own prices for services and receive substantially higher reimbursement rates from commercial payors (UnitedHealthcare, Aetna, and Cigna).
- To maximize patient volume, FPMC paid kickbacks and bribes to induce surgeons to use FPMC to perform services. Throughout the life of the scheme, FPMC paid approximately $40 million not only to other physicians but also to chiropractors, lawyers, and workers' compensation preauthorization specialists in exchange for referrals of patients to FPMC. Some referred patients had out-of-network private insurance benefits, while others had benefits under federally-funded programs. In addition to paying for referrals, FPMC induced patients to use FPMC by waiving copays and paying for travel and lodging. FMPC also attempted to sell Medicare and Medicaid beneficiaries, as well as other patients with lower-reimbursing insurance coverage, to other facilities for cash.
- To hide the scheme, these kickbacks and bribes were funneled through various shell entities to disguise the payments. The payments were made pursuant to a sham "Management Support and Marketing Agreement" and other marketing service agreements. The payments were substantial, generally 10% of FMPC's expected collections for the referred procedures. For example, one spinal surgeon received a total of $7 million and two bariatric surgeons who were investors in FPMC received payments totaling over $4.5 million and $3.4 million. In addition to payments for referrals, surgeons were paid bribes and kickbacks in exchange for performing medical procedures, including surgeries, at FPMC.

Ten defendants pled guilty before the case went to trial. On April 10 of this year, following a federal trial and four days of deliberation, the *Forest Park* jury found seven individuals guilty of various charges related to the scheme[3]:

- Forest Park's managing partner was found guilty of conspiracy, paying kickbacks, commercial bribery in violation of the Travel Act, and money laundering. He faces up to 65 years in federal prison.
- The owner of the shell companies through which some of the bribes were routed was found guilty of conspiracy and paying kickbacks. He faces up to 20 years in federal prison.
- A spinal surgeon was found guilty of conspiracy and faces up to 5 years in federal prison.
- Another spinal surgeon was found guilty of conspiracy and receiving kickbacks, and faces up to 15 years in federal prison.
- A spinal surgeon who invested in FMPC was found guilty of conspiracy, commercial bribery and money laundering. He faces up to 30 years in federal prison.
- A pain management doctor was found guilty of conspiracy, paying kickbacks, and commercial bribery. He faces up to 20 years in federal prison.
- A nurse who recruited and preauthorized worker's compensation requests was convicted of conspiracy and paying kickbacks. She faces up to 10 years in federal prison.

Applicable Laws

Forest Park is significant insofar as it involved the Travel Act, a law that prosecutors have used to "federalize" state law crimes. While the Travel Act is over sixty years old, it is a relatively new weapon in federal prosecutors' arsenal for fighting healthcare fraud that supplements the more commonly used federal fraud and abuse laws such as the Anti-Kickback Statute ("AKS"), the Physician Self-Referral Law ("Stark") and the False Claims Act ("FCA").

The Anti-Kickback Statute

The principal federal fraud and abuse law underpinning the *Forest Park* prosecution was the AKS,[4] which makes it unlawful to offer, pay, solicit or receive anything of value to induce or reward the referral of services that are reimbursable under a federal health care program; the AKS does not reach services paid by private insurance, however. These kickbacks include anything of value and can take the form of cash or other remuneration. The AKS has several statutory and regulatory safe harbors upon which providers may rely to avoid liability. Referral arrangements that do not fit squarely within a safe harbor can expose the parties to civil and criminal liability.

Travel Act and Commercial Bribery Laws

The Travel Act[5] was originally intended to fight racketeering and corruption from organized crime. While the legislative history of the Travel Act reflects that initial purpose, courts have consistently found that it is not limited to that end. Under the Travel Act, it is illegal to travel or "use mail or any facility" in interstate or foreign commerce with the intent to (1) distribute the proceeds of unlawful activity, (2) commit violent crime in furtherance of unlawful activity, or (3) "otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." The definition of "unlawful activity" under the Act includes extortion, bribery, or arson in violation of state or federal law. Because of this definition, the Travel Act effectively "federalizes" state law violations, providing federal jurisdiction where there is bribery under state law. In this way, federal prosecutors have been able to secure criminal convictions by using state commercial bribery statutes where federal criminal law might not otherwise be implicated. Many states, including Wisconsin,[6] have enacted commercial bribery statutes, effectively extending the reach of the Travel Act.

For example, the Travel Act has previously been used as an adjunct to prosecutions under the Foreign Corrupt Practices Act ("FCPA").[7] In that context, commercial bribery refers to an offer or payment of something of value to induce *a private party* to provide an improper *commercial* benefit as opposed to bribery of *public* officials. In *United States v. Carson*,[8] federal prosecutors targeted a company for bribes paid both to foreign government officials and to employees of a foreign private company. Although the FCPA only applies to the payments to the foreign government officials, the prosecutors were able to bring charges involving commercial bribery under the Travel Act based in part on California's anti-bribery statute.

Similarly, in *United States v. Welch*,[9] the court upheld an indictment under the Travel Act predicated on the Utah state bribery statute in connection with 2002 Olympic Games in Salt Lake City; the indictment also included federal conspiracy and wire fraud claims. As to the Travel Act claims, the court held that the underlying bribery charges need not involve organized crime. Also, the court held the lack of state prosecution for the state bribery offense was irrelevant to the Travel Act charges. To violate the Travel Act, the court explained, an individual need only use "interstate facilities with the requisite intent to promote such unlawful activity."

Significant but Not Unprecedented

Although the *Forest Park* verdict has the healthcare industry buzzing regarding the Travel Act's extension to healthcare cases, *Forest Park* is not quite as unprecedented as it may seem. As indicated above, courts have already taken a broad reading of the Travel Act and allowed prosecutors to supplement federal prosecution using state commercial bribery laws. Further, Forest Park is not the first time the Travel Act has been used in health care fraud prosecutions. In *United States v. Greenspan*,[10] for example, a family practice physician was convicted under the Travel Act and the AKS of accepting bribes to refer patients to a laboratory. As in *Forest Park*, *Greenspan* involved not only direct cash payments but also payments for advertising services. Finally, although the use of the Texas commercial bribery law was allegedly untested (*Forest Park* defendants reportedly argued that Texas commercial bribery statute had not previously been used by Texas prosecutors), the *Welch* case above shows that prosecutors need not prove the underlying state bribery charge to successfully assert a Travel Act charge.

Implications

Forest Park and *Greenspan* undeniably reflect an expansion on the types of healthcare fraud schemes that are subject to potential federal prosecution, but their significance should not be overstated. At their core, each case did involve healthcare fraud – these were not innocent arrangements with parties who found themselves ensnared in an overzealous prosecution. Before the *Forest Park* jury could convict under the Travel Act, it first had to conclude that a defendant had the requisite intent to promote unlawful commercial bribery under Texas law. While much of the reaction to the *Forest Park*convictions has focused on that *federal* prosecution using a *state* law and involving *private* insurance benefits, it is important to note that the indictments also asserted violations of federal law involving bribes and kickbacks, conspiracy and money laundering impacting federally-funded programs including Medicare, Texas Medicaid (which is jointly funded by the State of Texas and the federal government), the Federal Employee Compensation Act, TRICARE, and the Federal Employees Health Benefits Program. Each of the individuals who were convicted under the Travel Act were also prosecuted for and convicted of separate federal crimes. In this regard *Forest Park* is similar to the *Carson* case mentioned above, where the Travel Act charges involving commercial bribery of foreign businesses supplemented the main charges under the FCPA for bribery of foreign government officials.

This is not to say that the addition of state law commercial bribery claims in a federal healthcare fraud prosecution is much ado about nothing. While prosecutors had to prove an intent to promote unlawful commercial bribery, prosecutors did not have to prove that the defendants actually violated Texas law, making it somewhat easier to get a conviction. The addition of counts under the Travel Act made it easier for prosecutors to charge defendants with conspiracy, since some alleged co-conspirators might have violated the federal AKS (or in the case of *Carson*, the FCPA) while others violated state commercial bribery laws, but all could be swept into the same "conspiracy." The inclusion of commercial bribery claims under the Travel Act will also have a significant impact on sentencing: each violation of the Travel Act carries with it the potential of up to five years' prison time, and the additional improper benefits obtained by the defendants from commercial payors significantly increases offense level calculations under federal sentencing guidelines. But while some industry commentators predict that *Forest Park* is a harbinger of future prosecutions involving commercial insurance payors, the question remains as to whether the government would have prosecuted the FPMC actors under the Travel Act if their activities involved *only* private insurance and no federally-funded healthcare programs.

Nevertheless, it is to be expected that federal prosecutors will continue to employ more aggressive methods in their fight against healthcare fraud. Today's news focuses on the Travel Act. Tomorrow could bring healthcare fraud indictments based on federal mail and wire fraud statutes in efforts to combat crime of a local commercial nature, so long as the scheme involves an instrumentality of interstate commerce. The government is already using those tools to supplement FCPA prosecutions, similar to its use of the Travel Act.

Takeaways

The Travel Act is not new, nor is the obligation to ensure that physician compensation arrangements are not artifices for improperly influencing referral patterns. Wisconsin has long had a statutory prohibition on commercial bribery that is comparable to the Texas law in *Forest Park*, and we are surrounded by states with similar laws. Viewed in that light, *Forest Park* essentially provides one more reason for healthcare providers to do what they should have been doing all along. There are certain steps that the industry should be taking in response to this case, however.

First, providers should immediately review any compensation arrangements that have been designed to carve out federal program business, such as those that limit their scope to services provided to commercial payors, self-funded employer plans, or cash-paying patients. There may be legitimate reasons for such carve-out arrangements. Nevertheless, the business rationales for these arrangements should be reviewed to confirm that they do not constitute a kickback or bribery scheme under *either* federal *or* state law. In the marketing arrangements at issue in *Forest Park*, for example, FPMC paid advertising costs even though the ads were designed to promote the referring physicians' private practices and contained little if any reference to the hospital; if those physicians were making referrals of designated health services under the federal Stark law, those arrangements clearly would have run afoul of Stark.

Second, corporate counsel and compliance officers should review existing compliance policies to ensure that they address concerns regarding commercial bribery as well as situations involving public officials and federally-funded healthcare programs. These policies may include not only corporate code of conduct/anti-corruption policies but also policies regarding gifts and entertainment. While gifts and entertainment may be perfectly legal, it is important to review these policies and their interplay with state commercial bribery laws to ensure that the policies clearly prohibit giving anything of value for the purpose of improperly influencing referral patterns or other activities.

Policy reviews should then be supplemented by a review of the internal controls that are in place to monitor compliance with those policies, again with an eye toward compliance with state commercial bribery laws. There were many red flags at FPMC that should have triggered further inquiry and analysis, such as by the nurse who preauthorized workers' compensation requests – instead, she now faces up to ten years in federal prison resulting from her convictions for conspiracy and paying kickbacks.

Finally, the *Forest Park* and *Greenspan* cases offer many real-life lessons that can be incorporated into providers' employee training materials. Training typically includes descriptions of what is allowed and prohibited under healthcare fraud regulatory schemes such as Stark, AKS and FCA. These training programs likely need to be updated to address conduct under state commercial bribery laws and the federal Travel Act, with reference to the factual patterns (and painful lessons) from these cases.

---

[1]Forest Park Medical Center indictment: https://www.vonbriesen.com/uploads/Indictment-USv.Beauchamp.pdf.

[2]FPMC settled with the government prior to the indictment. It should also be noted that there were other physician-investors who did not participate in the bribery

scheme and were not indicted.

[3]Jury findings are taken from a press release by the Northern District of Texas U.S. Attorney's Office (Apr. 10, 2019) available here: https://www.justice.gov/usao-ndtx/pr/seven-guilty-forest-park-healthcare-fraud-trial (last visited Apr. 19, 2019).

[4]42 U.S.C. § 1320a-7b(b).

[5]18 U.S.C. § 1952.

[6]*See* 134.05 Wis. Stat., which makes it illegal to "corruptly" give, offer or promise any gift or gratuity to an agent, employee or servant with the intent to influence the recipient's action in relation to the business of the recipient's principal, employer or master.

[7]15 U.S.C. §§ 78dd-1, *et seq*.

[8]2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011).

[9]327 F.3d 1081 (10th Cir. 2003).

[10]2016 WL 4402822, Cr. No. 16-114 (D.N.J. Aug. 16, 2016).