NOW +
NEXT

HEALTH CARE ALERT | NIXON PEABODY LLP

APRIL 23, 2019

NP

DOJ obtains convictions in the Forest Park health care fraud trial for kickbacks involving private payers

By April Schweitzer and Theresa Smith

On April 9, 2019, a federal jury returned guilty verdicts against seven of nine individual defendants, including four physicians, affiliated with the Forest Park Medical Center ("FPMC"), a now-defunct physician-owned surgical hospital in Dallas. The trial centered on allegations that FPMC, through its owners and managers, paid around $40 million in bribes and kickbacks to surgeons, primary care physicians, chiropractors and others in exchange for referrals of patients with high-reimbursing out-of-network private insurance benefits or benefits under certain federal health care programs. Many of these kickbacks were disguised as consulting or marketing fees paid as a percentage of the revenue anticipated or generated from the referrals to FPMC. The government alleged that FPMC received over $200 million from referrals tainted by the bribery scheme.

Of the seven defendants convicted at trial, all were found guilty of conspiracy to violate the federal Anti-Kickback Statute ("AKS"), a law that prohibits anyone from offering, paying, soliciting or receiving anything of value in exchange for referrals of items or services reimbursable under a federal health care program. But perhaps most notable, the jury found two of those defendants guilty of violating the federal Travel Act by paying or receiving kickbacks for referrals of **privately insured** patients. Two other defendants pleaded guilty before trial to similar Travel Act violations.

Although not entirely new, the prosecution's use of the Travel Act to address bribes paid for commercially insured patients is a novel approach to health care fraud enforcement. Since most federal health care fraud prosecutions have involved Medicare, Medicaid or other government insurance programs, the risk that federal enforcement agencies might scrutinize arrangements involving purely private payers is often overlooked. The recent convictions and guilty pleas in the FPMC trial serve as an important reminder that the federal government has an array of tools for prosecuting perceived kickbacks, including in matters that do not implicate federal health care programs.

Congress enacted the Travel Act almost sixty years ago to expand the federal government's ability to prosecute organized crime that crossed state lines. The Travel Act allowed the Department of Justice to pursue cases that previously fell within the exclusive jurisdiction of state and local law enforcement, provided an interstate nexus existed, such as criminal activity involving the use of interstate travel or interstate commerce. Until recently, health care fraud involving private payers

This newsletter is intended as an information source for the clients and friends of Nixon Peabody LLP. The content should not be construed as legal advice, and readers should not act upon information in the publication without professional counsel. This material may be considered advertising under certain rules of professional conduct. Copyright © 2019 Nixon Peabody LLP. All rights reserved.

was generally thought to be a state enforcement issue arising from state laws that prohibit commercial bribery or kickbacks involving commercial health insurance. But as reflected in the recent FPMC trial, and in a few similar prosecutions that have occurred in recent years, the federal government has shown an increased willingness to use the Travel Act to prosecute individuals who violate state bribery laws by paying or receiving kickbacks for referrals of privately insured patients.

Given this expansion of federal enforcement authority, health care providers should not assume that they can avoid scrutiny or liability simply by "carving out" federally insured patients from the scope of their arrangements with other providers, suppliers or third-party vendors. Additionally, since commercial bribery statutes and anti-kickback laws differ from state to state, providers that do business across state lines may find that conduct considered legal in one state may be illegal in another. The bottom line is that providers must understand the state laws that may apply to arrangements involving private payers and carefully review all contracts for compliance, regardless of payer mix.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- April Schweitzer at **aeschweitzer@nixonpeabody.com** or 312-977-4365
- Rebecca Simone at **rsimone@nixonpeabody.com** or 516-832-7524
- Brian French at **bfrench@nixonpeabody.com** or 617-345-1258
- Ethan Domsten at **edomsten@nixonpeabody.com** or 312-977-9250
- Philip Rosenberg at **prosenberg@nixonpeabody.com** or 518-427-2709
- Valerie Breslin Montague at **vbmontague@nixonpeabody.com** or 312-977-4485