Why Your Compliance Efforts May Be Worthless

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It's a riddle almost as inscrutable as that of the Sphinx: How can a physician or pharmacist or facility owner be convicted of a federal crime for violating a state law? The answer is, unfortunately, quite simple, quite questionable and quite dangerous. It turns what many think about federal healthcare law compliance on its head.

It signals that many compliance efforts and, probably, most attempts to skirt the bounds of federal law, have been in vain, and must immediately be reinvestigated, re-planned and, in many cases, retired.

Context

To put things into context, let's use the concept of a kickback and the federal Anti-Kickback Statute (AKS) to frame the discussion.

In everyday terms, the AKS prohibits the offer, solicitation, payment or acceptance of remuneration—that is, the transfer of anything of value—for referrals of federal healthcare program patients. The affected programs include Medicare, Medicaid, TRICARE and about a dozen others.

The AKS is a criminal statute. Violation can lead to fines and prison time. Physicians and hospital administrators are serving time in federal penitentiaries right now for their violation of the AKS.

Carveouts

Many physicians, healthcare business owners and facilities have turned to what they think is a solution: the so-called "carveout" to avoid federal scrutiny. In large part, that's because they saw their state's law, and sometimes their state's enforcement of state law, as either permissive or lacking in "teeth."

As a result, they have structured deals in which no federal healthcare program patients are treated or served.

For example, anesthesiologists practicing as chronic pain management specialists in states that permit physicians to own interests in retail pharmacies are often approached by pharmacists to do rather interesting pharmacy deals.

They'll propose that the physician become one of the owners of a pharmacy that will fill prescriptions only for commercially insured patients; that is, only for those who are not participants in any federal healthcare program.

They believe that any issue of remuneration to referral sources (that is, inside of the relationship between the pharmacy and the physician), is outside of federal scrutiny.

Or, as a second type of arrangement, they structure deals in which all sorts of patients are treated but in which payments that might be challenged as remuneration in violation of the AKS are limited to being in respect of nonfederal healthcare program patients only.

For example, consider a deal in which an ambulatory surgery center (ASC) charges the anesthesiologists or nurse anesthetists practicing at the facility a management fee only in connection with commercially insured patients.

Note, as an aside, that this sort of carveout has never been viewed as valid by the Inspector General, as the management fee paid on the commercial part of the anesthesia providers' practice induces not only the referral by the ASC of those patients, but of the federal healthcare program patients (e.g., Medicare patients) as well. However, those planning these

sorts of deals generally have turned a blind eye to that fact.

Carveouts Carved Out

Despite these planning "best practices" (yes, that's meant to be tongue-in-cheek), federal prosecutors are demonstrating their willingness to charge healthcare providers and other scheme participants with federal crimes related to underlying state law violations, including those implicating state laws that have nothing in particular to do with healthcare fraud and abuse.

For instance, in a current case in the Northern District of Texas (*United States v. Beauchamp, et al*) prosecutors obtained an indictment under 18 U.S. Code § 1952 – Interstate and foreign travel or transportation in aid of racketeering enterprises—commonly known as the Travel Act, a law that can be used to "federalize" underlying state law violations.

The *Beauchamp* case is the second federal court prosecution related to a now defunct chain of physician-owned hospitals in Texas known as "Forest Park." Among other things, the prosecutors in this ongoing case allege the payment of approximately $40 million in kickbacks to physicians, including at least one anesthesiologist, consultants and others in connection with a half-billion dollars of kickback-tainted claims.

The Forest Park founders established the hospitals as both out-of-network facilities and, as a result of their physician ownership, non-Medicare facilities. In fact, their model was not to treat any federal healthcare program patients. Nonetheless, the membrane blocking patients from the plethora of federal healthcare programs turned out to be merely semi-permeable, and Tricare patients leaked in.

In pertinent part, the Travel Act makes it a crime to use the mail or any facility in interstate commerce (e.g., email, the phone) with the intent to further any "unlawful activity." As defined in the Travel Act, unlawful activity includes, among other things, bribery in violation of the laws of the State in which it is committed.

In the *Beauchamp* case, Texas's broad commercial bribery statute was the hook into the Travel Act allegation.

That Texas law defines a number of professionals (including physicians, attorneys and corporate officers, among others) as "fiduciaries" owing duties to their "beneficiary," the person or entity on behalf of whom they are acting. In lay terms applicable to the indicted physicians, the law makes it a felony for a physician to accept any benefit from a third party pursuant to an understanding that it will influence the physician's conduct in relation to his or her patients.

Depending on how a particular state law defines bribery, conduct in a carved out healthcare deal can (and did in *Beauchamp*) trigger federal prosecution under the Travel Act.

The Bottom Line For You

For a variety of reasons, not the least of which is that the federal government collects huge multiples in settlements and fines for every dollar put into investigating and prosecuting physicians and others for healthcare-related crimes, physicians, other providers and facilities now have targets painted on their backs.

Deal planning, deal vetting and ongoing compliance efforts that consider only federal healthcare laws, or only federal *and* state healthcare laws, are no longer sufficient.

Getting paid and staying out of jail now requires careful scrutiny of conduct against a filter of a wide range of federal and state laws that transcend application to any one industry, from statutes relating to commercial bribery, wire and mail fraud, to, as mentioned above, the Travel Act.

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