

**DOJ's Recent Prosecutions
Under the Travel Act:
Practical Implications for the
Healthcare Industry**

Kate Pfeifle
Former Assistant United States Attorney
Dallas, Texas

Andrew Wirmani
Assistant United States Attorney
Northern District of Texas
Dallas, Texas

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**Federal Enforcement of
Corrupt Payments**

- Anti-Kickback Statute to address corrupt payments
 - Limitation -- applies only to government program referrals
- Travel Act – does not have limits to federal programs

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The Travel Act

- Travel Act (18 U.S.C. § 1952)
 - Enacted in 1961 to combat racketeering activity
 - Makes it illegal to travel in or use mail in interstate commerce with the intent to promote or facilitate any “unlawful activity,” which includes bribery as defined by state law
 - Federal prosecutors are using state bribery laws to indict physicians and providers for unlawful referral arrangements

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Elements Of Travel Act Offense

1. Interstate Element
 - Mailings
 - Wirings/Use of Wires
 - Travel
 - Note: disagreement as to how integral needs to be
 - Courts are in agreement defendant need not have known about interstate element
2. Intent Element
3. Performance Element
(Subsequent Overt Act in Furtherance)

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State Criminal Laws as Predicates

- In health care context, government uses various state criminal laws as predicates to Travel Act violations.
- In a nutshell, if:
 - State law prohibits certain conduct; and
 - Involves interstate commerce (use of U.S. Postal System)... THENPotential Violation of the Travel Act

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Example: Texas Commercial Bribery Statute

- (a) For purposes of this section:
- (1) "Beneficiary" means a person for whom a fiduciary is acting.
 - (2) "Fiduciary" means:
 - ...
 - (C) a lawyer, physician, accountant, appraiser, or other professional adviser; or ...
 - ...
- (b) A person who is a fiduciary commits an offense if, without the consent of his beneficiary, he intentionally or knowingly solicits, accepts, or agrees to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary.

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Key Aspects of the Travel Act

- Penalties
 - 5 year max for non-violent offenses
 - Fine = maximum of either \$250,000 or twice gross gain/loss
- Different than healthcare fraud/kickback offenses
 - No requirement of “fraud” – no need to prove material false statement
 - No federal health care benefit program involvement
- Predicate for 18 USC 371 Conspiracy (Conspiracy to Violate the Travel Act)
- Based on violation of State Law
- Elements of Predicate State Offenses Vary

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Recent Prosecutions Using the Travel Act

- BLS, et al. (DNJ)
 - 53 convictions (38 doctors)
- Forest Park Medical Center (NDTX)
 - 18 convictions (7 doctors)
- Operation Spinal Tap (CDCA)
- Insys Physicians (SDNY)
- Surgical Assistance Inc. (EDNY)
- Friedman (CDCA)

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BLS Sentences

Sales Reps

- 72 months
- 43 months
- 41 months
- 37 months
- 24 months
- 24 months
- 24 months
- 21 months
- 21 months
- 21 months
- 20 months

Doctors

- 63 months
- 48 months
- 46 months
- 42 months
- 41 months
- 37 months (x8)
- 33 months
- 30 months
- 24 months (x5)

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Forest Park Medical Center

- Physician-owned hospital
- Opened in Dallas in 2009
- No Medicare or Medicaid reimbursement
- Started out of network with all commercial payors



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FPMC Indictment

- Charged bribe payors, bribe recipients, and bribe facilitators
- Conspiracy to pay and receive healthcare bribes and kickbacks
- Violation of Anti-Kickback Statute
- Violation of Travel Act (18 U.S.C. § 1952) and Texas Commercial Bribery Statute
- Money Laundering

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BRIBE AND KICKBACK RECIPIENT	AMOUNT RECEIVED
Won	\$5,945,000
Kim	\$4,595,000
Rimlawi	\$4,952,500
Nicholson	\$3,655,000
Shah	\$67,850

BRIBE AND KICKBACK RECIPIENT	AMOUNT RECEIVED
Foxx	approx. \$500,000
Forrest	approx. \$450,000
Gonzales	approx. \$385,000
Hillman and Narosov	approx. \$190,000
Bicklein	approx. \$100,000

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FPMC - Denial of Motion to Dismiss Indictment
District Court Order (3:16-CR-516, Dkt. 470)

- Argument: TCBS is preempted by the AKS
- Ruling: “Nothing in the federal Anti-Kickback statute or its regulations indicates that Congress intended the federal Anti-Kickback Statute to be the exclusive means of prosecuting health care fraud—indeed, the long coexistence of the federal statute with parallel state statutes suggests the opposite.”

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FPMC – Denial of Motion
to Dismiss Indictment

- Argument: Prosecuting health care kickbacks under the Travel Act using the TCBS violates the Constitution due to absence of state enforcement
- Ruling: “[B]ecause commercial bribery coupled with a sufficient interstate nexus is a matter of federal concern, the court concludes that the Travel Act counts do not run afoul of federalism principles.”

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Dallas Morning News

NEWS > CRIME

Lawyer tells jury in Forest Park bribery trial that surgeons who took money followed his advice

A key witness for the defense told jurors in the Forest Park Medical Center kickback trial that he believes his clients followed his legal advice when he told the surgeons they couldn't accept money for patient referrals.



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Takeaways: Use of the Travel Act for Corrupt Payments

- Offering inducements for patient referrals, even if only commercial or self-pay patients, could still result in criminal liability
- Calls into question “carve-out arrangements” that pay remuneration for only Medicare or Medicaid business
- Even if funds are not paid directly to a physician and are expended on actual marketing services under co-marketing arrangement, government could still find the arrangements problematic if marketing expenses are paid in exchange for referrals

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Enforcement Beyond Federal Programs

- Travel Act
- Honest Services Fraud
- Eliminating Kickbacks in Recovery Act (“EKRA”)
- Risks of carve outs if federal patients slip through

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Future of Federal Enforcement

- Corrupt payment prosecutions no longer limited to cases involving govt. programs
- Impact on Compliance Programs
- Questions remain:
 - Who is covered?
 - Role of safe harbors

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Disclaimer

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QUESTIONS?

Andrew Wirmani
Assistant United States Attorney
P: 214.659.8681
E: andrew.wirmani@usdoj.gov

Kate Pfeifle
P: 214.405.7705
E: kate.pfeifle1@gmail.com

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