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Medical marketing arrangements: A new legal landscape for physicians

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A recently concluded jury trial in federal district court in Texas has major nationwide implications for existing and future marketing arrangements between medical facilities and doctors ("medical marketing arrangements").

In United States v. Michael Alan Beauchamp, et al., a jury found seven of nine defendants affiliated with Forest Park Medical Center in Dallas guilty of criminal charges, including violations of the Travel Act, a 1960s federal statute originally intended to federalize state criminal law violations in the context of organized crime. Those seven defendants now face the prospect of multi-year prison sentences. William Nicholson, MD, whom we represented, emerged as the sole defendant acquitted. (The jury was unable to reach a verdict for the ninth defendant.)

In Beauchamp, the government successfully argued that the Travel Act federalized state bribery laws in the context of healthcare—similar to the well-established expansion of RICO enforcement beyond the organized crime arena to a broader range of criminal activity. This novel application of the act brought the full power of the federal government to bear on arrangements previously considered subject only to enforcement by state law enforcement authorities. The successful federal prosecution in Beauchamp has three broad implications:

FEDERAL LAW NOW APPLIES TO MOST MEDICAL MARKETING ARRANGEMENTS

Prior to Beauchamp, medical facilities and doctors entered into marketing arrangements with the expectation that they would not be subject to federal law unless those arrangements involved procedures reimbursed through federally funded programs such as Medicare, Medicaid, and TRICARE. This effectively meant that arrangements for procedures reimbursed solely through private or self-insurance could theoretically provide doctors incentives that would be suspect or impermissible under federal law.

The guilty verdicts in Beauchamp upend these long-held assumptions. Any nexus to interstate commerce—such as payment through an out-of-state private insurer—can now trigger the application of federal law and the vast investigative and prosecutorial power of the federal government. Given the high level of scrutiny directed to the healthcare industry, the widespread attention Beauchamp has already received, and jury pools likely receptive to allegations of healthcare fraud, similar prosecutions in the future appear inevitable.

THE LIKELIHOOD OF STATE-LEVEL ENFORCEMENT NO LONGER INFORMS MEDICAL MARKETING ARRANGEMENTS

The government's application of the Travel Act in Beauchamp required establishing a violation of state-law bribery or anti-kickback statutes. Therefore, Beauchamp did not fill a vacuum in state law as written.

Rather, it filled a vacuum in state-level enforcement of the relevant criminal statutes against healthcare professionals. States generally have fewer enforcement resources at their disposal than the federal government. State attorneys general or local district attorneys may also, for policy or other reasons, choose not to put medical marketing arrangements between private parties at the top of their priorities list. These pragmatic constraints at the state level fostered, in some instances, a certain aggressiveness and creativity in marketing and other arrangements between doctors and health care facilities.

Beauchamp fundamentally alters this legal calculus. State law now matters when determining the legality of medical marketing arrangements regardless of whether state-level enforcement is robust or minimal. Effectively, if an arrangement violates a state criminal law, by application of the Travel Act it can now be found to violate federal criminal law as well. Moreover, in the wake of Beauchamp, local district attorneys

may see legal and political opportunity in the assertion of enforcement power against healthcare professionals, leading to a more vigorous application of state bribery and anti-kickback laws.

GETTING TO "NO": CAUTION IS THE NEW BYWORD IN MEDICAL MARKETING ARRANGEMENTS

Healthcare facilities face relentless economic pressures. While providing incentives for doctors to perform their procedures at a given facility can make obvious economic sense, even prior to Beauchamp structuring those incentives in a legal way required careful lawyering and vigilant execution—for example, it is not always easy in practice to avoid procedures reimbursed wholly or in part through a federally funded program.

Also, state law considerations could not be wholly ignored, even if it was assumed that they were unlikely to be enforced. Nonetheless, the general approach for some doctors, healthcare facilities, and their attorneys focused on first deciding the desired terms of the marketing arrangement and its economic benefits, and then figuring out a way to "make it happen" legally.

Beauchamp makes such an approach foolhardy. Health care facilities and doctors should subject both existing and future marketing arrangements to rigorous and conservative legal review, with a view to determining the limits of what they may do rather than structuring a vehicle for enabling what they want to do. What is accepted as permissible in practice by facilities and doctors today may be grounds for criminal prosecution tomorrow.

THE FULL IMPLICATIONS OF BEAUCHAMP WILL CONTINUE TO PLAY OUT

The guilty verdicts in Beauchamp will almost certainly be appealed. Some of those appeals may focus on procedural aspects of the trial, such as the adequacy of the jury instructions. Some are likely to address fundamental questions of federalism, specifically the expanded application of the Travel Act to federalize state bribery and anti-kickback laws against healthcare professionals and their medical marketing arrangements.

However, even if the federal government is found on appeal to have overreached in Beauchamp, it is unlikely to simply cede its interest in narrowing acceptable commercial activity and business practices in the healthcare arena. Medical marketing arrangements should now be structured, drafted, and implemented with cautious restraint rather than permissive enthusiasm.

NINE DEFENDANTS, ONE ACQUITTAL: THE WINNING DEFENSE OF WILLIAM DANIEL "NICK" NICHOLSON, MD

Only one of the nine defendants in Beauchamp was acquitted: William Daniel "Nick" Nicholson, MD. How was this favorable outcome for Nicholson achieved in a trial where the convicted defendants now face up to 12 years of incarceration and, in the case of the doctors among them, the loss of their medical licenses? Three factors are particularly noteworthy:

- **The presentation of Nicholson's facts:** The Winston & Strawn legal team successfully distinguished the facts and the arguments helpful to Nicholson's defense from those applicable to other, differently situated defendants. For example, they were able to show that the frequency and types of procedures performed by Nicholson at Forest Park did not vary substantially during the period of the marketing program and after it stopped—and thus that those payments did not influence his choice of hospital for his patients. These facts had to be drawn out of often complicated and confusing billing records and then presented in a compelling but scrupulously accurate way.
- **The defense as a whole:** The Winston & Strawn team encouraged the jury to consider Nicholson's facts on their own merits without imputing culpability to the other defendants. As part of this strategy, although Nicholson was the only defendant represented by Winston & Strawn, the Winston & Strawn team played a leadership role in trying to keep the total defense as cohesive and reasonable as possible, providing advice and support to other defendants where appropriate. The team played this role strictly behind the scenes, however, so as not to take a leading role in front of the jury as to anyone but Nicholson.
- **Nicholson's participation:** Nicholson himself played a crucial role throughout the process. Although he did not testify, he was willing to expend both the resources and the time and attention necessary to educate his legal team on everything from bariatric surgery to insurance reimbursement. Lawyers have a duty to zealously represent their clients regardless of the client's level of engagement; however, Nicholson's participation illustrates the positive role a similarly engaged client can play in obtaining a favorable outcome.

Thomas M. Melsheimer, a partner with Winston & Strawn, tries lawsuits in state and federal courts, emphasizing intellectual property, business torts, and False Claims Act (FCA) litigation. His trial experience is unusually broad and extensive. On the civil side, he has tried to verdict cases involving patent infringement, trade secrets, insider trading, antitrust, breach of fiduciary duty, fraud, product liability, and FCA violations. On the criminal side, he has tried to verdict cases involving bank fraud, public corruption, copyright infringement, aggravated sexual assault, and kidnapping. Tom's jury trials include successfully representing plaintiffs and defendants on both coasts and throughout Texas.

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