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Government Enforcement / White Collar Crime

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Federal Jury Acquits Former Warner Chilcott President

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On June 17, 2016, a federal jury in the District of Massachusetts acquitted Carl Reichel, the former president of specialty pharmaceutical manufacturer Warner Chilcott, on a single count of conspiracy to violate the federal Anti-Kickback Statute. Reichel was accused of having orchestrated a company-wide scheme to bribe doctors and medical office staff with lavish meals and speaker fees in exchange for writing more prescriptions of the company's osteoporosis and contraceptive drugs. Reichel was indicted just weeks after the Department of Justice announced, through the "Yates Memo," its initiative to pursue charges against individual defendants more aggressively in connection with corporate misconduct.

Reichel's acquittal, following a three-week trial featuring numerous cooperating and immunized witnesses, can be seen as an example of the obstacles faced by the government in proving allegations that high-ranking corporate officials directed misconduct that took place primarily at lower levels of the company.

A. Warner Chilcott's Plea Agreement

Reichel's acquittal follows the company's October 2015 guilty plea in which it admitted to crimes in connection with sales force misconduct. This included a plea to allegations that the company paid kickbacks, in the form of lavish dinners, speaker fees, and other remuneration, as part of Medical Education or "Med Ed" programs that frequently contained little or no clinical content.

In particular, the company admitted that it provided the sales force with virtually-unlimited expense accounts for programs that the government claimed were largely social events. Additionally, sales representatives selected high-prescribing doctors as speakers at these events, but the speakers generally did not engage in an in-depth clinical discussion about the product, or sometimes even attend the events at all. According to the company's guilty plea, sales representatives were instructed to tell doctors that if they wanted to continue receiving speaker fees, they needed to maintain "clinical experience" with Warner Chilcott products. According to the government, "clinical experience" was a code word for prescribing a higher volume of product. In addtion, the government alleged that the company imposed a market share requirement for speakers, requiring these speakers to prescribe a certain percentage of the Company's osteoporosis drug Atelvia.

In its October 2015 plea, the company also pleaded guilty to a federal Health Care Fraud offense in connection with an alleged scheme to manipulate prior authorizations to induce insurance companies to pay for prescriptions. Specifically, the government alleged that sales representatives were instructed to coach doctors and staff, providing "canned" justification language for prior authorization forms that would result in a successful prescription, without regard to whether the justification was true for a particular patient. Additionally, sales representatives were instructed to take the staff responsible for submitting prior authorizations out to lavish dinners or lunches in order to convince the staff to submit the forms. Finally, the company admitted that in many instances, sales representatives around the country actually filled out the prior authorization forms themselves, often providing the "canned" language, and in

the process viewing patient information in violation of the Health Insurance Portability and Accountability Act ("HIPAA").[1]

B. Prosecution of Other Individuals

In addition to Reichel, the government pursued several other individuals in connection with the Warner Chilcott investigation. Three former district managers were indicted and pleaded guilty to conspiracy to commit healthcare fraud and to HIPAA violations (in connection with the alleged prior authorization misconduct). Two of these district managers testified as government witnesses during the Reichel trial. Additionally, a physician in Western Massachusetts was arrested and indicted for accepting kickbacks, violating HIPAA, and obstructing a criminal investigation. The physician is accused of accepting speaker fees and free meals, including a barbeque at her home, in exchange for prescribing two of Warner Chilcott's osteoporosis products. This case is still pending.

C. Obstacles Faced by the Government at Trial

Reichel's prosecution and acquittal is indicative of the obstacles implicit in prosecuting a senior executive for sales force misconduct. At trial, the government's case against Reichel rested on the proposition that Warner Chilcott's admittedly-aggressive sales culture amounted to a criminal conspiracy orchestrated by Reichel to violate the Anti-Kickback statute.[2] The government's case largely consisted of testimony and documents from sales force personnel about the Med Ed and speaker programs and about the company's confrontational sales pitches. In the end, however, the court instructed the jury that Reichel could not be convicted of conspiring to violate the Anti-Kickback Statute merely because the company was aggressive and sought to cultivate business relationships or goodwill through its Med Ed and speaker programs. Rather, the court instructed that the burden fell to the government to prove that at least part of the purpose of the alleged remunerations (i.e., the speaker fees and Med Ed programs) was to effect a quid pro quo transaction. It further instructed that the government had the burden of proving that Reichel and at least one co-conspirator agreed to violate the law (in this case the Anti-Kickback Statute offense alleged in the indictment). Although the government put on a large amount of testimonial and documentary evidence as to the highly aggressive sales culture at Warner Chilcott, it struggled to convince the jury that this sales culture was more than just an aggressive strategy, but rather amounted to a criminal conspiracy, orchestrated by Reichel and others to violate the law.

During the course of the trial the government also sought to show a disparity between Warner Chilcott's official compliance guidelines and sales representatives' admittedly non-compliant behavior in the field as examples of a wink-and-nod compliance culture fostered by Reichel. Reichel's counsel aggressively argued, however, that the conduct of these sales representatives was not at his direction. Rather, he argued, this misconduct was the product of "rogue" sales representatives and district managers who testified at trial as immunized cooperating witnesses.

D. Conclusion

We will continue to monitor the evolving developments on the scope and application of the Anti-Kickback Statute and the impact of the Yates Memo. In the meantime, the Reichel trial demonstrates that, although the government may be able to extract a substantial corporate criminal plea based on sales force misconduct, it faces difficulty

[1] Additionally, the company admitted that it had made unsubstantiated and unsupported superiority claims when marketing Actonel and Atelvia, claiming that these products were superior to other bisphosphonate osteoporosis drugs because of their "mechanism of action." Sales representatives were instructed to tell physicians that Actonel and Atelvia were superior because they penetrated more deeply into the bone and then exited more quickly, although there was no head-to-head study supporting this claim.

[2] Although Reichel was not charged with prior authorization manipulation or misconduct related to HIPAA, the government alleged that sales representatives provided benefits to doctors' office staff in exchange for filling out and submitting the prior authorization forms.

proving criminal charges against individual senior executives–particularly where executives have layers of managerial distance from sales personnel in the field.

If you have any questions about the Reichel trial, or about recent Anti-Kickback Statute enforcement more generally, please contact the Ropes & Gray advisors with whom you usually work.