Published on *The National Law Review* https://natlawreview.com

Final Curtain Call for Tuomey: Long-Running FCA/Stark Case Settled

Article By:

Todd Hemprill

Wilson Hayman

After 10 years of litigation, including two trials and appeals to the 4th Circuit Court of Appeals, the U.S. Department of Justice (DOJ) and Tuomey Healthcare System (Tuomey) have entered into a settlement of DOJ's action against Tuomey alleging violations of the Stark law, which created a right of action under the False Claims Act (FCA). The $72.4 million settlement (including $18.1 million for the physician who originally brought the suit) is approximately one-third of the amount of the jury's original award of $237 million in FCA damages and penalties. The total settlement amount was based largely on Tuomey's ability to pay, since the jury verdict exceeded the hospital's annual revenues. In addition to the settlement amount, Tuomey agreed to enter into a Corporate Integrity Agreement (CIA) requiring ongoing compliance, and to affiliate with Palmetto Health, a health care system in Columbia, S.C.

The case originally arose after Tuomey, which is located in Sumter, S.C., proposed part-time employment contracts with area specialist physicians, in part to address concerns regarding the opening of a new ambulatory surgery center. The contracts were all fairly similar. Each physician was paid an annual guaranteed base salary, which was adjusted from year to year based on the amount the physician collected from all services rendered during the previous year. The bulk of the physicians' compensation was earned in the form of a productivity bonus, which paid the physicians 80% of the amount of their collections for that year. The physicians were also eligible for an incentive bonus of up to 7% of their earned productivity bonus.

One of the physicians, Dr. Drakeford, an orthopedic surgeon, questioned whether those contracts violated the Stark law, because their compensation was in excess of their collections and did not reflect fair market value. To address this issue, Tuomey and Dr. Drakeford jointly retained a lawyer who had formerly worked for the Office of Inspector General and was a nationally recognized expert in this area of the law. That attorney indicated that the arrangement raised a number of red flags and would likely be found in violation of the Stark law. Tuomey, however, ultimately relied on other attorneys who opined that the contracts did not violate Stark, and entered into employment contracts with a number of the physicians. Dr. Drakeford refused to enter into a contract and filed a qui tam suit pursuant to the FCA alleging Stark violations. DOJ subsequently intervened on Drakeford’s behalf.

After a first trial in Tuomey's favor was reversed on appeal, the second trial focused on whether Tuomey was entitled to rely on an "advice of counsel" defense, i.e., because it had relied on the advice of its attorneys that the contracts did not violate the law. The jury found, however, that given the contrary advice of the attorney jointly retained with Dr. Drakeford, Tuomey effectively was shopping for favorable legal opinions and did not act in good faith. The Court of Appeals agreed, concluding that it was "difficult to imagine any more probative and compelling evidence regarding Tuomey's intent than the testimony of a lawyer hired by Tuomey, who was an undisputed subject matter expert on the intricacies of the Stark law, and who warned Tuomey in graphic detail of the thin legal ice on which it was treading with respect to the employment contracts." United States ex rel. Drakeford v. Tuomey. Significant to the court, several of the attorneys who offered legal opinions favorable to Tuomey either were not given all of the facts as to how the fair market value of the physician contracts was reached, and/or were not told of the first attorney's negative assessment of the contracts.

On the issue of damages, Tuomey argued that damages for the false claims should be based solely on the four Medicare cost reports it submitted, rather than the 21,730 individual claim forms submitted to Medicare for reimbursement, alleging that the fraud occurred only when the cost reports were submitted. The court disagreed, concluding that Tuomey was asking for reimbursement for a prohibited referral every time it submitted one of these claim forms, and consequently, each form properly constituted a separate FCA claim. The damages and penalties provided under the FCA for those false claims formed the majority of the award amount.

As noted in Judge Wynn's concurrence on the last page of the opinion, "[i]t seems as if, even for well-intentioned health care providers, the Stark law has become a booby trap rigged with strict liability and potentially ruinous exposure—especially when coupled with the False Claims Act." Although the settlement ultimately will allow Tuomey to survive as an ongoing health care provider, the case highlights the dangers hospitals face in entering into physician agreements, and the necessity to carefully analyze those agreements with counsel, to ensure compliance with the FCA and the Stark law.

National Law Review, Volume V, Number 308