

PUBLICATION

"The Stark Law has become a booby trap..." Says the Federal Appeals Court. Why Health Care Providers Should Heed the Warning

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After reading through the hundreds of pages of the District Court's and Appeals Court's decisions, including the recent Fourth Circuit Court of Appeals decision that was filed on July 2, 2015, one thing is certain: Mixing one part bad facts with two parts confusing law makes for one terrible hangover – a \$237,454,195 hangover.

By now, there are probably a hundred summaries of the July 2 Tuomey Court of Appeals decision, which upheld the District Court's \$237 million judgment against Tuomey Healthcare System (Tuomey) in Sumter, South Carolina, a small, mostly rural community which qualified as a federally designated medically underserved area. So, rather than more of the same, set forth below is a list of some do's and don'ts for health care providers trying to navigate the Stark Law.

As background, the Stark Law is a federal law which prohibits physicians from referring Medicare patients to an entity for designated health services (DHS) with whom they (or their family members) have a financial relationship (compensation or ownership), and prohibits the entity from billing for the DHS, unless a Stark Law exception is satisfied.

Do's and Don'ts

1. **Be wary of part-time employment or agency agreements with physicians unless there are legitimate business reasons.**

The courts noted that Tuomey wanted to enter into these agreements so as not to lose referrals from 20 physicians. It estimated a loss of \$8-\$12 million in referrals over a 13-year period if these physicians ceased using the hospital outpatient facilities and moved their services to another facility or provided them within their offices.

2. **Be careful what you say, especially in writing, even if it's to your attorney. Try to avoid any concepts or language evoking referrals or other business generated for the health care provider.**

Although reliance upon counsel can be an effective defense for liability under the False Claims Act (but not for the overpayment arising directly from the Stark violation), as Tuomey saw firsthand, such defense requires disclosure of all attorney communication, even if the attorney-client privilege would otherwise apply.

3. **Determine the appropriate term of a contract. In Tuomey, a ten-year term for a part-time employment agreement appeared suspect.**

The government noted that ten years is a long period of time for a physician employment agreement.

4. **Compensation to be paid to a referring physician must be carefully scrutinized and fair market value determination clearly documented.**

The court, jury and government also looked at the fact that the physicians were compensated 31 percent above and beyond their total net collections, and the government's expert witness argued that this was in excess of fair market value. The District Court also focused on the fact that the physicians received a small base salary and the "bulk" of the compensation was the productivity bonus, which was 80 percent of the amount of their collections.

5. **Be cautious when basing physician compensation on wRVUs (work Relative Value Units) or professional collections for personally performed services which are linked to hospital services and perhaps other DHS.**

The government argued, and the jury agreed, that the compensation varied with the volume or value of referrals since physicians referred Medicare patients to Tuomey and Tuomey billed hospital based and thus, the court believed the compensation varied with the corresponding Medicare facility fee, notwithstanding the professional service was personally performed by the physician. We believe that the court only focused upon the indirect compensation arrangement (ICA) definition under Stark, but that, with better facts and proper analysis, the ICA exception is still available when the compensation is based on wRVUs.

6. **Just because you didn't get that lawyer's warning in writing doesn't mean it can't come back to haunt you.**

Attorney emails and opinions became admissible when Tuomey (rightly or wrongly) decided to defend itself with an "on advice of counsel" defense. Thus, there were emails and depositions citing a jointly hired attorney by the qui tam relator and Tuomey, questioning the legality under Stark of such part-time employment agreements. The court also placed emphasis on the fact that such attorney was told not to put his findings in a memorandum and the engagement ended soon thereafter.

7. **Don't shop around for opinions. When you obtain disparate opinions from your counsel, compliance officer or even opposing counsel, you potentially are on notice and this can be enough to prove intent to defraud, deliberate ignorance or reckless disregard of the Stark Law and lead to a False Claims Act violation.**

Tuomey moved forward with these employment agreements notwithstanding conflicting advice from various counsel. The court held that information from the one counsel questioning the legality of such agreements proved intent – that Tuomey knew the contracts might not satisfy Stark and thus, knowingly filed false claims with the government. Tuomey was assessed a fine of \$186,347,210 for violation of the False Claims Act and a Stark Law compensatory overpayment of \$51,106,985.

8. **Be wary of disgruntled parties. They can become wealthy (or wealthier) qui tam relators.**

In Tuomey, one of 20 physicians didn't like the contract terms and wanted to negotiate. Tuomey would not. This physician, Dr. Drakeford, became a qui tam relator, shared with the government his information concerning what he believed to be Stark violations, and now will share in up to 30 percent of the \$237 million.

9. **Always educate your staff on compliance with the laws and being mindful of internal emails and external emails to the proposed party with whom you are trying to contract, merge, acquire, etc.**

Always be able to document the true intent and legitimate legal purpose behind entering into an arrangement with referring physicians.

The courts noted Tuomey's fear of loss of revenues over the 13-year period.

10. **If you uncover a potential Stark violation, consider reporting under the Medicare Self-Referral Disclosure Protocol (SRDP) established by HHS.**

Although there is no prescribed formula for the reduced overpayment a provider will be assessed, CMS appears to be settling SRDP submissions for significantly less than the overpayment amount, not to mention avoiding False Claim and civil monetary penalties.

Disclosure of potential overpayments under the SRDP has become increasingly attractive given enactment of the 60-day overpayment statute, which subjects the failure to report and repay a known overpayment to False Claims and civil monetary penalties (even if the original claims were "unknowing").

11. **Make sure any consultants and lawyers hired to assist with contracting, fair market valuations and regulatory analysis are provided with all of the pertinent facts.**

The court noted that some of Tuomey's counsel and consultants, while qualified in Stark, were not

given all of the facts by Tuomey. Additionally, many consultants are hired by legal counsel in order to assert the privilege and maintain the confidentiality of such consultant's work product.

Probably the most interesting part of the July 2 decision are the words of Judge Wynn, who, while concurring, wrote his own opinion. He observed that the Stark Law is "[a]n impenetrably complex set of laws and regulations that will result in a likely death sentence for a community hospital in an already medically underserved area." He went on to note that "[i]n the context of the Stark Law, it is easy to see how even diligent counsel could wind up giving clients incorrect advice." He concluded "the Stark Law has become a booby trap rigged with strict liability and potentially ruinous exposure – especially when coupled with the False Claim Act."

This is an unsettling time for providers who want to do the right thing and comply with all laws, including the Stark Law. We are here with decades of experience willing to help you navigate these laws and explore all possible theories.

If you have any questions regarding the Stark Law, please contact any of the attorneys in the Firm's Health Law Group.