

Appellate Court Affirms \$237 Million Award Against Hospital for Stark Law Violations

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The Fourth Circuit Court of Appeals recently issued an alarming decision affirming a \$237 million judgment against Tuomey Healthcare Systems, a nonprofit hospital located in a small, largely rural South Carolina community that is a federally-designated medically underserved area. The judgment resulted from a jury's finding that Tuomey submitted 21,730 false claims to Medicare for reimbursement knowing that the claims were generated through part-time physician employment contracts that violated the referral constraints found in the Stark Law. The decision clarifies that hospital "facility fees" associated with outpatient procedures performed by physicians constitute "referrals" under the Stark Law even when the "referring" physician is personally performing the outpatient procedure. The false claims themselves had a total value of \$39 million, but with automatic treble damages and civil penalties in the minimum amount for each violation, the resulting judgment was for \$237 million. Despite its affirmance of the judgment, the Fourth Circuit panel recognized "the troubling picture this case paints: An 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." *U.S. ex rel. Drakeford v. Tuomey*.

The part-time employment contracts at issue in *Tuomey* allowed the physicians to maintain their private practices, but required them to perform all outpatient surgical procedures exclusively at the hospital. The contracts had multiple compensation components, two of which proved problematic under Stark. First, 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 the previous year. Second, 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 Stark Law is intended to prevent "overutilization of services by physicians who [stand] to profit from referring patients to facilities or entities in which they [have] a financial interest." If a physician makes such a referral, the hospital may not submit a bill for reimbursement to Medicare. While the term "referral" as used in Stark does not include any designated health service personally performed or provided by the referring physician, there is a "referral" as defined by Stark when the hospital bills a facility fee in connection with the personally performed service.

Here, even though the aggregate compensation received by the physicians was based on collections for personally performed professional services, because the hospital charged a facility fee as a component of the services, the jury found that the contracts violated Stark. Put simply, the more procedures the physicians performed at the hospital, the more facility fees Tuomey collected, and the more compensation the physicians received in the form of increased base salaries and productivity bonuses. As such, the physicians' compensation varied with or took into account the volume or value of anticipated referrals to the hospital and, therefore, violated Stark.

There are at least three important lessons to be learned from the *Tuomey* decision. First, physicians must avoid any financial arrangement with a medical facility – hospital or otherwise – which compensates the physician in any manner, even in an indirect manner, that varies with the volume or value of referrals. Second, violations of Stark can have devastating – even draconian – consequences. Less than \$40 million in improper Medicare claims resulted in a \$237 million judgment. Finally, the fact that a medical facility is a nonprofit entity located in a small, rural community that is federally-designated as medically underserved offers no protection or safe haven from Stark Law violations.

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