

Health Care Bulletin



False Claims Act

February 1, 2010

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Case Regarding Part-Time Employment Agreements Violating Stark and Anti-Kickback Slated for Trial

Since its filing in South Carolina U.S. District Court in October of 2005, the case of *U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc.* has progressed slowly. However, the judge in the case recently notified both parties that no more continuances will be granted, and that, if the parties do not settle the case in the interim, the trial will commence on March 3, 2010.

A lawsuit under the False Claims Act (FCA) was brought against Tuomey Healthcare System (Tuomey) regarding referrals from employed part-time physicians of Tuomey. The relator in the case, Dr. Drakeford, was a physician who Tuomey attempted to employ under a part-time employment agreement. The government and relator allege that the part-time employment agreements for roughly 18 physicians in various specialties violated the Stark Law and the Anti Kickback Statute (AKS.) Because the agreements paid physicians at more than fair market value (FMV), restricted patient referrals to Tuomey, and contained inappropriate non-compete clauses, all referrals from the employed physicians were in violation of the FCA.

The government's position is that the compensation paid by Tuomey was in excess of FMV because it exceeded 130 percent of the physicians' net collections on procedures they performed. The government has argued that the compensation for physicians in similar specialties whose compensation is set between the 25th and 90th percentiles generally is 49 to 63 percent of collections on procedures performed. The government has taken the position that compensation that exceeded 130 percent of the physicians' net collections on

procedures they performed was such a gross deviation from an acceptable FMV salary range as to violate both the strict liability Stark Law and the intent-based AKS. With respect to the Stark Law, the government has argued that compensation under employment contracts must be FMV and that the compensation paid by Tuomey to these 18 physicians was not. The government's argument that the facts evidence a violation of the AKS is premised on the belief that the compensation was so excessive on its face, that Tuomey's offer of such terms constituted a knowing and intentional effort to defraud the government. The government also has alleged that Tuomey proceeded with the employment contracts despite receiving multiple legal opinions that the contracts violated the Stark Law. In its defense, Tuomey claims that it received and relied upon legal and valuation opinions supporting the agreements' compliance with the Stark Law.

There are several facts involved in this case that may make a verdict in this case particularly noteworthy:

1. **Reliance on Valuation Opinion** – Tuomey sought and received a valuation analysis of the contracts in question and relied upon its valuation consultant's opinion that the contracts met FMV. If, as the government claims, the value of the compensation was so out of line that Tuomey should have known it didn't meet FMV, regardless of a valuation opinion, blind reliance by health care providers on valuation opinions will certainly carry additional risk.

2. **Standing of Relator to Bring Action** – Tuomey claims that it sought advice from the government regarding the compliance of the part-time contracts prior to Dr. Drakeford going to the government. If this claim is found to be true, the court might find that the relator is not the original source of the allegations and, therefore, lacks standing to bring the case on behalf of the government. This does not mean, however, that the government could not decide to bring the case in its own name if it believes that the allegations have merit.
3. **Poor Management of a Potential Whistleblower** – Prior to Tuomey’s disclosures to the government or Dr. Drakeford’s actions as a whistleblower, Dr. Drakeford sought the opportunity to voice his concerns to the Tuomey Board of Directors at their regularly scheduled meeting. The Board allegedly responded to the request by instituting a policy under which the chairperson of the board could act as a gatekeeper to bar any issues from reaching the attention of either the full Board or any of its committees. It also, if the requestor were allowed to address the Board, barred the requestor’s attorney from being present at the Board meeting. The Board did not respond to Dr. Drakeford’s written request to present his information, it merely sent him a copy of the new policy.

Whether the Tuomey case proceeds to trial or settles, the case provides important guidance for health care organizations to avoid whistleblowers and FCA actions. Valuation analyses should never be blindly accepted without some “sanity checking” by the organization, and health care providers act at their own risk if they “shop” for valuations until they get the one that blesses the compensation they want to pay a physician. The Tuomey case also places organizations on notice that they are proceeding down a risky path when they ignore legal advice from impartial third parties that the planned course of action may violate the Stark Law and/or the AKS. The Tuomey case also demonstrates that having internal policies that facilitate and encourage the internal reporting of potential violations of law before they become a public problem is vital. No less important is appropriately responding to and acting on the report of such potential violations of law once they are received.

This Bulletin was prepared by David M. Johnston. For more information about how you can help protect your organization from potential whistleblower and FCA violations, contact a member of the Bricker & Eckler False Claims Team.

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