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Health Headlines

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Fourth Circuit Tuomey Decision Interprets Stark Law While Remanding Case for Retrial

On March 30, 2012, finding that the district court violated Tuomey's Seventh Amendment right to a jury trial, the United States Court of Appeals for the Fourth Circuit vacated a $44.9 million judgment against Tuomey Healthcare System, Inc. (Tuomey) for Stark law violations and remanded the case to federal district court. (*United States ex rel. Drakeford v. Tuomey Healthcare System Inc*., 4th Cir., No. 10-1819, March 30, 2012). While the Fourth Circuit's opinion largely addresses procedural issues, two judges on the three-judge panel took the opportunity to outline their views on certain Stark law issues raised in the *Tuomey* case. Specifically, the judges addressed the following two questions:

(1) Whether the facility component of hospital outpatient services performed by the physicians pursuant to certain contracts (described below), for which Tuomey billed a facility fee to Medicare, constituted a "referral" within the meaning of the Stark law and Stark regulations (Issue No. 1); and

(2) Whether, assuming that Tuomey considered the volume or value of *anticipated* facility component referrals in computing the physicians' compensation, the contracts implicated the "volume or value" standard under the Stark law (Issue No. 2).

I. BACKGROUND

Between January 1, 2005, and November 15, 2006, Tuomey entered into compensation contracts with 19 specialist physicians, pursuant to which the physicians agreed to perform outpatient services at Tuomey Hospital and to reassign to Tuomey all amounts paid by third party payors. Tuomey agreed to pay each physician an annual base salary that fluctuated based on Tuomey's net cash collections for the outpatient procedures. Additionally, Tuomey agreed to pay each physician a productivity bonus equal to 80 percent of the net collections, and the physicians were eligible for a further incentive bonus.

The government alleged that these compensation arrangements violated the Stark law. The government sought relief under the False Claims Act (FCA) and further asserted equitable claims premised on violation of the Stark law. In 2010, a jury returned a verdict finding that while Tuomey had not violated the FCA, the hospital had violated the Stark law. The district court, however, set aside the jury verdict and ordered a new trial on the government's FCA claim. At the same time, the district court granted judgment on the government's equitable claims and awarded damages in the amount of $44,888,651, plus pre- and post-judgment interest.

Although the Fourth Circuit was not required to address the Stark law issues in order to reach its decision, two members of the three-member panel nonetheless chose to address these "other issues raised on appeal that are likely to recur upon retrial." The third member of the panel wrote a concurring opinion that described the majority opinion's discussion of Issue No. 1 and Issue No. 2 as "advisory in nature."

II. ISSUE NO. 1

The Fourth Circuit's majority opinion addressed whether the facility component of hospital outpatient services performed by the physicians pursuant to the contracts, for which Tuomey billed a facility fee to Medicare, constituted a "referral" within the meaning of the Stark law and Stark regulations. Noting that "[n]either the statute nor the regulation addresses whether a facility component that results from a personally performed service constitutes a referral," the Fourth Circuit relied on prior Health Care Financing Administration (HCFA) commentary regarding the personal services exception to the Stark law:

We have concluded that when a physician initiates a designated health service and personally performs it him or herself, that action would not constitute a referral of the service to an entity . . . However, in the context of inpatient and outpatient hospital services, there would still be a referral of any hospital service, technical component, or facility fee billed by the hospital in connection with the personally performed service. Thus, for example, in the case of an inpatient surgery, there would be a referral of the technical component of the surgical service, even though the referring physician personally performs the service. 66 Fed. Reg. 856, at 941 (2001).

The court concluded that claims for "facility fees based on patient referrals are prohibited under the Stark law if there was a financial relationship within the meaning of the law between the physicians and the hospital."

III. ISSUE NO. 2

Next, the Fourth Circuit addressed whether, assuming Tuomey considered the volume or value of *anticipated* facility component referrals in computing the physicians' compensation, the contracts implicated the "volume or value" standard under the Stark law. The court stated that the "government contends that Tuomey's conduct fits within this definition because it included a portion of the value of the anticipated facility component referrals in the physicians' fixed compensation." However, "Tuomey argues that the inquiry is whether the physicians' compensation takes into account the volume or value of referrals, not whether the parties considered referrals when deciding whether to enter the contracts in the first place." Although the court viewed the question of whether the physicians' compensation under the contracts took into account the volume or value of anticipated referrals to be "an open question of fact … for the jury to resolve on remand," the Fourth Circuit concluded that compensation arrangements that take into account "anticipated referrals" implicate the volume or value standard under the Stark law. To support its conclusion, the court cited agency commentary and the definition of "fair market value," which defines fair market value, in relevant part, as compensation that "has not been determined in any manner that takes into account the volume or value of *anticipated* or actual referrals." 42 C.F.R. § 411.351 (emphasis added).

To view the Fourth Circuit opinion, click here**.**

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