

Attention Health Care Providers: Are You in Violation of the Stark Act?

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An emerging case out of South Carolina may have a far-reaching impact on health care providers across the country. Health care providers have long been aware of the penalties for violating the Stark Law, only now violating the Stark Law may also bring False Claims Act charges and additional penalties that include treble damages.

The Stark Law and the False Claims Act

The Stark Law¹ generally prohibits a physician from making referrals for designated health services that will be payable by Medicare or Medicaid where the referral is to an entity in which the physician or an immediate family member has a financial relationship. The financial interest may be direct ownership, investment, or a structured compensation arrangement. The Stark Law is a strict liability statute - any violation, whether intended or not, will receive penalties. In contrast, the False Claims Act ("FCA")² creates liability for anyone who *knowingly* submits or causes the submission of a false or fraudulent claim to the United States. Penalties can include not only reimbursement but also triple damages, penalties ranging from \$5,500 to \$11,000 per claim, and possible exclusion from all federal health care programs. Due to the high dollar value of potential damages, many FCA cases settle out of court and new case law explaining the FCA is rare.

The Tuomey Case

Tuomey is a nonprofit community hospital in South Carolina. Having built an Outpatient Surgery Center, the hospital was concerned that its doctors would move their outpatient procedures to other facilities. Tuomey sought the advice of legal counsel which advised the hospital it had a legal duty to protect the corporation's assets and recommended offering part-time contracts to physicians. Counsel advised that these contracts would violate neither the Stark Law nor the FCA. One of the physicians offered a contract, however, filed a *qui tam*³ complaint alleging Tuomey violated both laws by providing compensation in excess of fair market value and that took into account the volume or value of the referrals or other business the physicians generated.⁴ The Department of Justice intervened in the lawsuit. Intervention by the Department of Justice only occurs after an extensive review process and occurs in less than 25% of FCA *qui tam* cases.⁵

In March 2010, the jury returned with a split verdict. It found Tuomey's part-time physician contracts violated the Stark Law but did not violate FCA. But the judge overturned the jury's ruling for Tuomey on the FCA claims. The re-trial of the FCA claims is likely to occur this fall while the appeal of the Stark Law claims is likely to be heard in the spring. The appeals court will decide whether Tuomey must pay Stark Law damages of \$44.8 million plus interest, for a total of \$49.3 million. The new jury will decide whether Tuomey must pay FCA damages of \$277.5 million in the FCA retrial.

Analysis

The *Tuomey* case may well signal a new and emerging tactic of the United States Department of Justice in its "war on health care fraud" and may have far reaching impact beyond South Carolina. Violations of the Stark Act may increasingly be used as a predicate for FCA violations in future cases brought by the United States Department of Justice throughout the country. Linking violations of these two laws that carry hefty penalties will undoubtedly increase the stakes for violations of the Stark Act. In light of this emerging trend,

health care providers would be wise to consult with legal counsel to review their contracts and practices for any potential impact from this case.

(1) 42 U.S.C. 1395nn (2010).

(2) 31 U.S.C. § 3729-3733 (2010).

(3) A *qui tam* lawsuit is an action brought under statute that allows a private person to sue for a penalty, part of which the government will receive and part of which the person bringing the action will receive. Generally under the FCA, whistleblowers bring *qui tam* actions.

(4) *U.S. ex rel Drakeford v. Tuomey Healthcare System, Inc.*, Civ. No. 3:05-2858 (D.S.C.).

(5) For more information on the Department of Justice's role in FCA *qui tam* actions, see False Claims Act Cases: Government Intervention in *Qui Tam* (Whistleblower) Suits, <http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf>.