



## **The Tuomey Case: "Stark" Reality?**

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After reviewing the landmark Tuomey case, healthcare providers and lawyers alike should consider what the results mean for future compensation arrangements. In Tuomey, it was alleged that agreements between Tuomey Healthcare System in Sumter, South Carolina and various physicians violated the Stark law when Tuomey engaged various surgeons to operate at Tuomey's new outpatient surgery center.

### **Compensation Exceeded Fair Market Value**

The agreements contained the following key terms: part-time employment covering only outpatient procedures, a ten-year term with a three-year non-compete, an initial salary based upon the previous year's collections or procedures, a productivity bonus of 80% of collections, and an incentive bonus of up to 7% of the productivity bonus depending on qualitative factors. The employment contracts did impose some additional administrative duties on the doctors, but those were minor—only about ten to fifteen hours a year. Additionally, under the agreements, Tuomey paid all malpractice premiums, including premiums covering the physicians for office services and inpatient procedures, and provided reimbursement for continuing medical education, cell phones, and periodicals/journals.

During the trial, the Government argued that a financial relationship clearly existed between Tuomey and the physicians, thus implicating the Stark law, and the arrangement did not meet any Stark exception as required by the law. The Government's experts opined that: (a) the physicians' compensation exceeded fair market value; (b) the ten-year term was atypical; (c) part-time, partial-services contracts were unusual; (d) the total exclusivity requirement was not standard; and (e) the full-time benefits received by the physicians were inconsistent with Tuomey's normal policy of providing benefits to full-time employees only.

Overall, the Government's position was that the arrangement was not fair market value for the services provided and wrongfully took into account the volume or value of referrals.

### **Jury Sides With Government; Court Levies Fine**

In response, Tuomey argued that the arrangement met the indirect compensation arrangement exception and the bona fide employment exception under the Stark law. Ultimately, the jury found that the agreements violated the Stark law, and Tuomey was ordered to pay \$44.8 million, plus interest. This amount reflected the sum that Tuomey was paid by Medicare as a result of the referrals made by the physicians in question, plus interest and other penalties. The Fourth Circuit will soon consider whether the jury correctly found that the contracts violated the Stark law.

### **Observations and Lessons**

Taking into account the facts of the case and the arguments presented by the parties, the following observations may be made:

- A long-term arrangement should be reviewed periodically for compliance.

- An arrangement should include enumerated administrative duties if part of the compensation is in return for performing those duties.
- In general, compensation per RVU should not exceed the 75th MGMA percentile unless there is a very legitimate reason.
- Physician benefits should be consistent with those provided to other hospital employees.
- Fair market value and commercial reasonableness should be established prior to the effectiveness of the arrangement.
- Paying physicians for loyalty is not permissible.
- Generally, arrangements where it is mathematically impossible for the provider to make money or break even, are suspect.