

The Difficulty Of Challenging FCA Fine As Excessive

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Last month, in *U.S. ex rel. Drakeford v. Tuomey*, No. 13-2219, (4th Cir. July 2, 2015), the Fourth Circuit affirmed a False Claims Act verdict against a nonprofit hospital in Sumter, South Carolina. In an area of the law where cases seldom make it to trial, the *Tuomey* case generated not one but two trials in over 10 years of protracted litigation, and ultimately resulted in a \$237 million verdict against *Tuomey*. The Fourth Circuit upheld the jury's damages verdict, rejecting *Tuomey's* arguments that an award so large constituted an unconstitutionally excessive fine.

Although the majority of the Fourth Circuit's decision focused on arguments made by *Tuomey* regarding its reliance on advice of counsel and whether it had knowingly violated the FCA, that this enormous award was upheld is noteworthy, as it represents the largest FCA fine to be upheld against a constitutional challenge under the Excessive Fines Clause. Indeed, the next-largest challenged award of \$64 million in *U.S. v. Rogan*[1] was multiples smaller.

It is no secret that the federal government recovers billions of dollars in FCA fines every year, and that it views these recoveries as the centerpiece of its efforts to fight fraud and abuse, particularly in the health care, financial services and government procurement sectors. But with FCA cases routinely settling, defendants rarely have an opportunity to object to the large fines levied by the government as excessive, even when they represent real and substantial economic hardship to the defendant. Indeed, *Tuomey's* challenge to the damages awarded by the jury and approved by the trial court as constitutionally excessive presents a rare opportunity for potential FCA defendants to examine the scope and breadth of the government's power to seek significant and ever-expanding damages in FCA cases.

The Damage Award May Likely Put Tuomey Out of Business

The \$237 million verdict against Tuomey eclipses the hospital's annual revenue and is believed to be the largest damages award ever against a community hospital.[2] In fact, the hospital's decision to continue with the case over the years rather than settle may have been motivated by the size of the potential damages it faced; Tuomey may have fought the government as vigorously as it did because it had no choice but to try to stave off a damages award that threatened the hospital's economic viability. Indeed, in February, Tuomey announced that it was entering into negotiations with another healthcare system to help it weather unsustainable financial trends that included, in part, the cost of the FCA litigation.[3]

Recognizing the likely devastating economic impact of upholding the damages awarded by the jury, Judge James Wynn of the Fourth Circuit panel that heard the case wrote a separate concurring opinion to "emphasize 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." Tuomey, 2015 WL 4036166, at *19. Certainly, even the majority opinion could "not discount the concerns raised by [the] concurring [opinion] regarding the result in this case." Id.

The "Impenetrably Complex Set of Laws" at the Heart of Tuomey's \$237 Million Fine

Tuomey's liability was premised on violations of the Stark Law, which prohibits physicians from referring patients to hospitals or other facilities with which the physician has certain financial relationships. The Stark Law imposes strict liability for hospitals that submit for payment a Medicare claim for services rendered pursuant to a prohibited referral. 42 U.S.C. § 1395nn.

In addition, the FCA imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to an officer or employee of the federal government. 31 U.S.C. § 3729 (a)(1)(A), (b)(2)(A)(i). Each false claim submitted to the government is subject to a civil penalty of not less than \$5,000 and not more than \$11,000, "plus 3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729 (a)(1); 28 C.F.R. § 85.3(a)(9).

The Fourth Circuit took the position that "each time Tuomey submitted to Medicare [a form] asking for reimbursement for a prohibited referral, it was knowingly asking the government to pay an amount that, by law, it could not pay." Tuomey, 2015 WL 4036166, at *16. Therefore, every Medicare claim submitted by Tuomey that was based upon a referral prohibited under the Stark Law constituted a violation of the FCA.

The jury found that Tuomey submitted 21,730 false claims for reimbursement to Medicare, which therefore constituted 21,730 separate FCA violations and resulted in actual damages of \$39,313,065. This amount was then trebled for a total of \$117,939,195 in compensatory damages. The district court also added a civil penalty, as authorized by the FCA, in the amount of \$119,515,000, which was calculated by applying the statutory minimum (\$5,500) to each of the 21,730 claims. The combination of actual, compensatory damages and the civil penalty resulted in total damages of \$237,454,195. Id. at *1.

What Constitutes an Excessive Fine Under the FCA?

Tuomey challenged the \$237 million damages award as unconstitutional under the Excessive Fines Clause of the Eighth Amendment. Rejecting the challenge, the Fourth Circuit upheld the award, noting that "[w]hile the award is substantial, we cannot say that it is unconstitutional." Id. at *17. This raises

the question: What then is considered an unconstitutionally excessive fine under the FCA?

The Excessive Fines Clause prohibits the government from imposing excessive fines as punishment. Where a civil penalty is imposed for the purposes of punishment, as is authorized by the FCA, the Eighth Amendment applies, but the fine “will only be found constitutionally excessive if it is ‘grossly disproportional to the gravity of [the] offense.’” *Id.* (quoting *Korangy v. FDA*, 498 F.3d 272, 277 (4th Cir. 2007)). The Tuomey court noted that “instances in which the penalty prescribed under the FCA is unconstitutionally excessive will be ‘infrequent.’” *Id.* (quoting *U.S. ex rel. Bunk v. Gosselin World Wide Moving NV*, 741 F.3d 390, 408 (4th Cir. 2013)). This is because the purpose of damages under the FCA is to punish wrongdoers for defrauding the government. In the Fourth Circuit’s words, the “FCA imposes damages that are essentially punitive in nature,” making it much harder for defendants to argue that an FCA fine is excessively punitive. *Id.* (quoting *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000)).

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the U.S. Supreme Court found a \$145 million punitive damages award on a \$1 million compensatory judgment to be unconstitutionally excessive. Although the Court declined “to impose a bright-line ratio which a punitive damages award cannot exceed,” it noted that the Court’s “jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* at 425. The court further noted that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” *Id.* After reviewing a series of precedents in which the court had considered “double, treble, or quadruple damages to deter and punish,” the court noted that these ratios “demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1.” *Id.*

In Tuomey, the court referenced this four-to-one ratio in assessing whether the ratio of compensatory to punitive damages was constitutionally valid. The Fourth Circuit determined that the entire civil penalty of \$119,515,000 was punitive in nature and that the actual damages of \$39,313,065 was “entirely compensatory,” leaving “the additional sum of \$78,626,130 resulting from the trebling of actual damages [as] a hybrid of compensatory and punitive damages.” Tuomey, 2015 WL 4036166, at *19. These amounts, however, were acceptable from a constitutional perspective because the ratio of punitive damages to compensatory damages was “approximately 3.6-to-1, which falls just under the ratio the Supreme Court deems constitutionally suspect.” *Id.*

In concluding that the damages award was within a constitutionally acceptable range, the Tuomey court never discussed the fact that the size of the award was likely to have a crippling effect on the hospital itself. And while this consideration would seem relevant, nothing in current jurisprudence actually requires a court to do more than analyze the fine in proportion to the underlying conduct in determining whether the fine is excessive. So long as the ratio of punitive to compensatory damages is consistent with the Supreme Court’s prior guidance (i.e., in the general category of four to one) and the court analyzes the defendants’ conduct in proportion to the fine at issue, courts are not required to (and typically do not) make an assessment of the economic effect of the overall damages — or even the punitive portion of FCA fines.

The Government Gets Its Costs First, Including Relator Awards

Furthermore, Tuomey and its predecessors make clear that it is consistent with the FCA and does not

offend the Excessive Fines Clause if a fine compensates “the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims.” *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 130-31 (2003). This is because the government’s injury includes “not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the government’s efforts to root out deceptive practices directed at the public purse.” *Id.* Among the aspects of the government’s costs that an FCA damages award is intended and expected to compensate is the FCA’s “qui tam feature with its possibility of diverting as much as 30 percent of the government’s recovery to a private relator who began the action.”

Although it did not address the Excessive Fines Clause directly, in *Cook County, Ill. v. U.S. ex rel. Chandler*, the Supreme Court endorsed the view that, “[i]n qui tam cases the rough difference between double and triple damages may well serve not to punish, but to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government, while benefiting himself as well.” *Chandler*, 538 U.S. at 131.

Following this lead, the Fourth Circuit in *Tuomey* specifically found the relator’s entire award to be compensatory, not punitive. The *Tuomey* court assumed that the relator would receive at least the minimum amount allowed by the statute, i.e., 15 percent of the total recovery, or \$11.8 million. *Tuomey*, 2015 WL 4036199, at *19. After calculating the relator’s award, the court of appeals deducted this amount from the damages total before calculating the ratio of compensatory to punitive damages. In this way, the Fourth Circuit indicated that courts are not expected to treat the relator fee as part of an FCA defendant’s punitive damages. Rather, before the fine and its fairness are assessed, the defendant is expected to reimburse the government the cost of the relator’s award. Had the court of appeals considered the relator’s fee to be part of the punitive fine in *Tuomey*, rather than the compensatory damages as it did, the ratio of punitive to compensatory damages would have been five to one, rather than four to one. This treatment of the relator’s award is significant because the punitive damages would then have fallen outside the constitutional boundaries articulated by the Supreme Court.

The Fourth Circuit’s opinion in *Tuomey* appears to be the first time a court has specifically designated the entire relator’s award as compensatory. Further, the court appears to have come to this conclusion *sua sponte*. Although *Tuomey* made numerous arguments supporting its view that the damages assessed against the hospital were unconstitutionally excessive, neither party specifically briefed how the relator’s fee should be treated or whether the fee could be considered entirely compensatory. There also was no discussion of the Excessive Fines Clause at oral argument beyond a passing mention by *Tuomey*’s counsel that the enormous fines were unconstitutional under the Eighth Amendment. Indeed, the arguments and decision focus almost entirely on other aspects of the case, in particular *Tuomey*’s reliance on advice of counsel regarding the permissibility of its contractual arrangements with physicians under the Stark Law.

The Defendant’s Conduct — Always the Touchstone

Not surprisingly, the primary focus for courts undertaking an analysis of whether an FCA fine is excessive in nature is the conduct underlying the fine itself. Simply stated, “[a] cumulative monetary penalty such as that imposed under the FCA will violate the Eighth Amendment proscription against excessive fines in the infrequent instance that it is ‘grossly disproportional to the gravity of a defendant’s offense.’” *Bunk*, 741 F.3d at 408.

In *Tuomey*, the Fourth Circuit acknowledged that the penalty was “certainly severe,” but noted that “it was meant to reflect the sheer breadth of the fraud *Tuomey* perpetuated upon the federal

government.” Tuomey, 2015 WL 4036166, at *18. In upholding the penalty, the court endorsed the view that “[s]ubstantial penalties also serve as a powerful mechanism to dissuade ... a massive course of fraudulent conduct.” Id. The court of appeals put great stock in the jury’s determination that Tuomey submitted false claims for Medicare reimbursement knowingly, rejecting Tuomey’s extensive arguments that (1) Tuomey relied on the advice of counsel regarding Stark Law implications of its relationships with physicians and (2) the Stark Law imposes strict liability, making it impossible, as the jury found, for Tuomey to have knowingly violated the FCA. Id. at *19. Rather, the court of appeals staunchly agreed with the government that “strong medicine is required to cure the defendant’s disrespect for the law.” Id.

Lessons Learned From Tuomey

Tuomey is a compelling decision for a number of reasons. First, while both the majority and concurring opinions acknowledged that the fine was so large as to likely have a substantial negative impact on the hospital’s ability to survive as a going concern and continue to provide services to a medically underserved area, the Fourth Circuit appears to have easily come to the decision that that fine was, nevertheless, constitutionally permissible.

Next, both the majority and concurring opinions acknowledged the legal quagmire in which Tuomey found itself, trying to navigate the complex regulatory framework of the Stark Law. As Judge Wynn acknowledged in a concurring opinion in the Tuomey case, the legal framework underlying the case against Tuomey essentially amounted to “a booby trap rigged with strict liability and potentially ruinous exposure.” Id. at *25. And still, Tuomey was not granted relief.

Finally, the Tuomey decision leaves no doubt that FCA defendants are expected to make the government whole and that this obligation extends to the cost of investigating and litigating FCA cases and beyond. In addition to putting the government in a position to recoup the costs associated with investigating and prosecuting a case, FCA defendants are expected to foot the bill for the relator awards as well and, no matter how large such awards may be, they will not count towards the level of punitive damages being imposed on a FCA defendant.

Regardless of the fate of Tuomey Healthcare System Inc., the Fourth Circuit’s opinion in this case serves as a warning that massive, multimillion-dollar fines are acceptable in FCA cases, particularly in cases where the government can characterize the defendant’s behavior as egregious. Although Tuomey may have been forced to litigate this case through trial, decisions such as the Fourth Circuit’s in this case, which spells out how difficult it is for an FCA defendant to argue that even a debilitating fine is unconstitutionally excessive, make it far more likely that defendants will continue to settle with the government, waiving their rights and arguments that the monstrous fines recovered by the government in FCA cases are unconstitutionally excessive.

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[1] In Rogan, the Seventh Circuit affirmed a district court's finding that a hospital administrator concealed payments to physicians for patient referrals in violation of the Stark Law and padded reimbursement submittals with unnecessary and/or unperformed services. *U.S. v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2008). The Seventh Circuit, while declining to reach the issue because Rogan failed to make an excessive-fines argument at the district court level, declined to disturb the district court's damages award, but noted that the total damages levied against Rogan was "less than four times actual damages [and thus] well within the single-digit level" approved by the Supreme Court as not "grossly excessive" for punitive damages. *Id.* at 454; see discussion of four-to-one ratio jurisprudence *infra*.

[2] Susan Morse, Tuomey Healthcare System loses appeal, will pay \$237 million over false claims, *Healthcare Finance* (July 7, 2015), available at <http://www.healthcarefinancenews.com/news/tuomey-healthcare-system-loses-appeal-will-pay-237-million-over-false-claims>.

[3] Lisa Schenker, Struggling Tuomey Healthcare starts merger talks with Palmetto, *Modern Healthcare* (Feb. 6, 2015), available at <http://www.modernhealthcare.com/article/20150206/NEWS/302069963>.