# PUBLICATION

## Stark Litigation: The Tuomey Saga Draws to a Close [Ober|Kaler]

**Authors: S. Craig Holden**
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**In what may be the penultimate chapter of the long–running saga of the *Tuomey* case, the Fourth Circuit affirmed the final judgment and award in favor of the government in its case against Tuomey Healthcare System, Inc. (Tuomey) on July 2, 2015.[1]**

The court upheld damages and penalties totaling $237,454,195 for violations of the Stark statute[2] resulting in violations of the False Claims Act .[3]

## Background

Beginning in 2003, Tuomey, a nonprofit health care system in Sumter, South Carolina, grew concerned that a number of gastroenterologists and other physicians were considering performing their outpatient surgical procedures at facilities other than the hospital. To prevent the loss of revenue, Tuomey began entering into agreements with physicians whereby they were considered "part time employees" and were required to perform their outpatient procedures at the hospital. Under the agreements, the hospital paid the physicians a base salary which fluctuated annually based on the physicians' net professional collections for outpatient procedures. Physicians also received a productivity bonus, which was 80 percent of the amount of their professional collections for the year, and an incentive bonus of up to 7 percent of their earned productivity bonus. This reportedly allowed a physician to receive up to 119 percent of the collections for their services. The hospital also paid for physicians' malpractice and health insurance, and paid their practice groups' shares of employment taxes. The physicians assigned their rights to bill to Tuomey (through an affiliate) and Tuomey absorbed each practice group's billing and collections costs. The contracts were for a term of 10 years, and contained non-compete provisions restricting the physicians from performing outpatient surgical procedures within a 30-mile radius of the hospital both during the term of the agreement and for two years after its expiration.

## The Legal Advice

The relator in this *qui tam* action was a physician who objected to the employment agreement. The relator's attorney had expressed significant concerns regarding potential violations of Stark. Meanwhile, Tuomey had obtained the advice of its counsel relating to the agreements, who concluded the arrangement was lawful. When those attorneys were unable to agree, Tuomey sought the advice of a third attorney who was formerly Chief of the Industry Guidance Branch of the United States Department of Health and Human Services Office of Counsel to the Inspector General, as a "tie-breaker." The former OIG attorney, who had drafted a "substantial portion" of the regulations implementing the Stark Law, warned Tuomey that the agreements did not pass the "red face test," and presented an easy case for the government to prosecute. Tuomey then sought the advice of a fourth attorney, who opined that the arrangements did not violate Stark. According to the court, that attorney was not given all the relevant information necessary to render an opinion.

## The First Trial

The government intervened, alleging, among other things, that the agreements were prohibited financial relationships within the meaning of Stark, and met none of the statute's exceptions. In the first trial of the case, the former OIG attorney's opinions were excluded from evidence, as were the statements of Tuomey's Chief Operating Officer (COO) regarding that advice, on the ground that his statements were in the context of settlement negotiations. Absent that testimony, the jury found that Tuomey had violated the Stark Law, but not the False Claims Act. The district court then granted the government a new trial on its FCA due to its error in excluding the COO's opinions from evidence.

## The First Appeal

An appeal to the Fourth Circuit followed. The Fourth Circuit remanded the case for a new trial on all issues, and further set forth its view on the Stark statute to be applied on remand. The court noted that in its view, a "referral" within the meaning of Stark occurred every time a physician performed a procedure at the hospital's outpatient facility. The court noted that while the physician's professional service was not within the definition of a *referral* under Stark, the technical component or facility fee billed by the hospital was a designated health service resulting from the physician's referral. Further, after reviewing the regulatory history, the court noted that under Stark, a physician's compensation may not take into account the volume or value of anticipated referrals. The court agreed with the hospital that the subjective intent of the party does not determine whether the volume or value standard is implicated, stating that "[t]he question, which should properly be put to the jury, is whether the contracts on their face took into account the volume or value of anticipated referrals."

## The Second Trial

On remand, the jury heard the opinions provided to Tuomey by the former OIG attorney whose advice was sought. The jury found that Tuomey violated both the Stark Law and the False Claims Act. The jury found that Tuomey had submitted 21,730 false claims worth $39,313,065, and the district court trebled the damages under the False Claims Act and awarded additional penalties (including the minimum $5,500 per false claim). The final judgment totaled $237,454,195.

## The Second Appeal

Tuomey appealed again. Tuomey argued that the government did not meet its burden to show that the physicians' compensation varied with the volume or value of the physicians' referrals. The Fourth Circuit disagreed and found ample evidence to support the jury's determination that the arrangements did indeed so vary. Namely, the annual adjustment of the physicians' salary based on collections from the prior year, as well as the bonus structure, were highlighted as problematic.

Similarly, the court stated that "the jury was entitled to pass on the contracts as they were actually implemented by the parties," despite the Fourth Circuit's prior instruction that the jury should assess the contracts "on their face" to determine whether they took into account the value or volume of referrals. The court pointed out that under the agreements, the more procedures the physicians performed, the more Tuomey billed and collected facility fees.

The key portion of the Opinion focused on the advice-of-counsel defense. At trial, Tuomey had argued unsuccessfully that it believed in good faith that the arrangements were Stark compliant, asserting the defense that it relied on the advice of counsel and had obtained a valuation to show that the agreements were at the

fair market value. Thus, Tuomey argued, it did not "knowingly" violate the False Claims Act. The Fourth Circuit disagreed; noting that *all* advice received was relevant to the defense. The court specifically pointed to the opinion of the former OIG attorney engaged by Tuomey and the relator, and went so far as to state that Tuomey was opinion shopping and trying to steer counsel to provide advice in its favor. The court pithily noted: "When the case was retried, [the former OIG attorney] was allowed to testify and the jury found for the government. Coincidence? We think not."

The court also noted that *any* referrals made during the term of a non-compliant financial relationship are prohibited, even those related to inpatient services not covered in the physicians' agreements, and confirmed that by violating Stark, the hospital's certifications to Medicare and its UB-92/04 forms became false.

Finally, the court was unpersuaded by Tuomey's argument that the award was excessive and unconstitutional. Although agreeing that the award was "substantial," it was not unconstitutional, and Tuomey's repeated actions warranted the steep verdict.

## The Concurring Opinion

Judge Wynn wrote a Concurring Opinion that summarizes the real risk to health care providers under Stark. He emphasized the growing complexity of Stark Law and its copious associated rules and regulations, noting that despite attempts to establish bright line rules, physicians and attorneys alike struggle to comprehend Stark and, "it is easy to see how even diligent counsel could wind up giving clients incorrect advice." He continued, "[t]his case is troubling. It seems as if, even for well-intentioned health care providers, the Stark Law has become a booby trap rigged with strict liability and potentially ruinous exposure—especially when coupled with the False Claims Act." Against that backdrop, Judge Wynn suggests that the survival of community hospitals like Tuomey, in medically underserved areas, is in jeopardy.

## Ober|Kaler's Comments

The Tuomey case is disturbing on many levels. The complexity of the Stark Law is well known, with numerous traps for the unwary or unsophisticated. This is greatly exacerbated by the strict liability provisions which deem any violation an overpayment, regardless of intent. Advice of counsel provides no protection against this overpayment liability. This fact causes many a sleepless night for attorneys practicing in the area.

It is the overlay of the False Claims Act on top of Stark, with its treble damages and per-claim penalties, that yields the absurd result in this case. A community hospital has been essentially bankrupted by a judgment far in excess of any damage incurred by the government.

To be sure, Tuomey is not without blame here. To an outside observer, many of its actions seem inexplicable. One wonders why Tuomey would ignore the emphatic warnings of one of the country's leading experts in the field. One further wonders why it would mount an advice-of-counsel defense on the theory that it could prevent those warnings from being presented to the jury.

All of that said, the Concurring Opinion has it right. This is bad policy. One hopes that reason will prevail and some accommodation can be found so that the people living in the community served by Tuomey will not be deprived of their hospital.

1 *United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, No. 13-2219 (4th Cir. July 2, 2015).
2 42 U.S.C. § 1395nn.
3 31 U.S.C. §§ 3729-33.