$276 million Tuomey case holds many lessons for risk managers

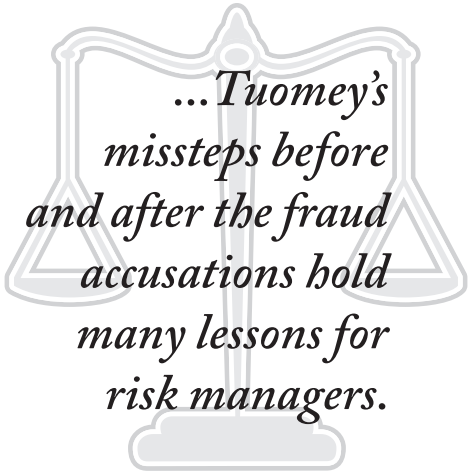
Physician arrangement leads to Stark, False Claims Act violations

In what is thought to be the largest judgment of its kind against a community hospital in U.S. history, a federal district judge in South Carolina has ordered Tuomey Healthcare System (THS) to pay $238 million for violations of the Stark Law and False Claims Act (FCA). Legal analysts say Tuomey's missteps before and after the fraud accusations hold many lessons for risk managers.

The Tuomey saga began eight years ago in 2005 when Michael Drakeford, MD, filed a qui tam lawsuit against Tuomey alleging that the Sumter, SC-based hospital system violated the Stark Law and the FCA by entering into prohibited contractual relationships with 19 physicians that required the physicians to perform all their outpatient surgeries at Tuomey's outpatient surgery center. (See the story on p. 135 for more background on this case.)

In the arrangement that later led to so much trouble, Tuomey agreed to pay each physician an annual base salary that fluctuated based on Tuomey's net cash collections for the outpatient procedures, plus a "productivity bonus" equal to 80% of the net collections. Physicians also could earn incentive bonuses of up to 7% of the productivity bonus. Physicians agreed not to compete with Tuomey during the 10-year term of the contract and for two years after.

The federal government attorneys joined the case after Drakeford's allegations and said that because Tuomey performed the billing for the services provided at its outpatient center, the claims THS submitted to Medicare and Medicaid were the result of prohibited contractual relationships and thus were false claims. Prosecutors also accused Tuomey of making false statements in its certificates of cost reports. (For more on the Tuomey background, see Healthcare Risk Management, July 2013, p. 80.)



Tuomey might not end up paying the entire $238 million, notes Thomas E. Bartrum, JD, a shareholder with Baker Donelson in Nashville, TN. The system has tried to settle the case earlier but would not accept the government's offer, he says, and it now might end up settling for even more because the verdict came in so high. Years of legal fees must make the total burden on Tuomey enormous, Bartrum says.

"If I were on the board of directors at this system, I would have asked for the resignation of this counsel and started the process for settling the matter much earlier," he says. "At this point their top priority must be putting this behind them and stopping the bleeding."

Risk managers should study the Tuomey case to see where the mistakes were made, suggests Alan H. Rumph, JD, an attorney with the law firm of Baker Donelson in Atlanta. The lucrative physician arrangement apparently misled Tuomey leaders who should have put the brakes on the deal, he says. (See the story on p. 136 for more on the lessons to take away from Tuomey's experience.)

"When a hospital is considering relationships with physicians, the number one priority should be compliance," Rumph says. "I know the economics are important and hospitals have to have relationships with physicians in order to survive, but compliance should be the first objective and everything else should flow from that."

The purpose of a physician arrangement should be providing better quality care to more patients, Rumph says. It is dangerous for the hospital or health system to openly discuss the potential financial benefits to the hospital, he cautions.

Bartrum concedes that hospitals will make that calculation, at least to ensure that the arrangement is economically feasible. "But what is really damning is when that calculation drives the whole transaction," he says. "If you say you can't let the doctors leave because you will lose $18 million a year, and that's the motivation for the arrangement, that gives the government a lot of ammunition to say that your compensation arrangements were driven by volume and value of referrals rather than a fair market value arrangement."

Fair market valuation turned out to be a key issue in the Tuomey case, and Bartrum says the case will lead to much closer scrutiny of valuation in similar arrangements.

continued on next page

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"Hospital leaders try to be compliant, I really believe that. But they often don't fully understand what they can and can't do in terms of Stark and the False Claims Act," Bartrum says. "A lot of times risk managers and lawyers are not brought to the table until all this background has been done. The incriminating e-mails are already circulating before we ever get involved in it."

Bartrum also cites what he calls "opinion shopping" by Tuomey when consulting with attorneys about the physician arrangement. Tuomey had attorneys warn them that the plan could be problematic, but they dismissed those opinions in favor others that said it was acceptable, Bartrum explains.

Rumph suggests that the Tuomey case might prompt similar allegations against hospitals and health systems. "With all this publicity and the financial windfall for this whistleblower physician, you're going to see more whistleblowers," Rumph says. "They're in a position to produce more of the facts than anyone else, after you've pitched the deal to them, and particularly if they are jealous that their competitors got in on the deal they didn't."

Executive Summary

Executive summary: The multi-million dollar award against the Tuomey Healthcare system holds important lessons regarding a hospital's business relationship with physicians. The case involved allegations of improper referrals and payment to physicians.

- Unlike many fraud cases, overbilling was not alleged by prosecutors.
- A jury determined that 21,000 Medicare claims were "tainted."
- The government sought and received more than the actual damages.

In addition to the lessons about how to avoid a Tuomey-like arrangement with physicians, the experience of the healthcare system also shows how not to handle such allegations once they hit the court system, says David M. Walsh IV, JD, a shareholder with the law firm of Chamblee Ryan in Dallas. Tuomey's troubles, and the magnitude of the judgment against it, could have been prevented by taking a more critical approaching to assessing the legality of the physician arrangement, he says. (See the story on p. 136 for more on Tuomey's missed opportunities. See the story on p. 137 for the likelihood of similar cases in the future.)

"The evidence established that Tuomey ignored legal advice that it received that did not support the arrangement and instead chose to listen just to the legal advice that supported the arrangement," Walsh says. "In this example, the contrarians were obviously right, and following that advice would have avoided Tuomey's problems."

SOURCES

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