

The Health Care Governance Implications Of Tuomey

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The Fourth Circuit's decision in *Drakeford v. Tuomey Healthcare System Inc.* has broad health system implications, not only for the technical interpretation of the Stark Law and False Claims Act, but also for a board's fiduciary obligation to provide oversight over corporate compliance.

In its ruling, the Fourth Circuit affirmed the lower court's decision to grant a second trial in a whistleblower case brought against Tuomey Healthcare System for allegedly violating the FCA, in which the second jury found Tuomey guilty of violating the FCA and Stark Law. In so doing, the court upheld a \$237 million FCA jury verdict rendered in 2013 against the health system. The case has its genesis in a complaint originally filed in 2005 by a whistleblower, Dr. Michael Drakeford, who declined to enter into a part-time employment agreement.



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The staggering size of the damages award, together with the Fourth Circuit's observations on the vicissitudes of the Stark Law, are certain to attract board attention. Moreover, significant portions of the judicial record in *Tuomey* addressed actions or nonactions of that health system's board as they related to the ultimately problematic part-time employment agreements entered into by the system. As such, the decision provides a valuable platform from which the general counsel may engage the board in a discussion of governance's going-forward role in the review of proposals that implicate the health care fraud and abuse laws.

Such a discussion would logically focus on both big picture considerations (e.g., a greater board awareness of the risks that may arise under the Stark Law and FCA) and more practical considerations (e.g., specific elements of the board's oversight process for physician arrangements that may merit reconsideration). Collectively, these go to the heart of the health system board's duty-of-care obligations, both with respect to informed decision-making and to exercising oversight over the organization, and in particular the effectiveness of its compliance activities.[2]

The Stark Law Matters

The enormity of the *Tuomey* verdict should have a shock effect on most boards. No matter the size and complexity of a health care system, \$237 million is a significant penalty (and indeed represents roughly the entire annual revenues of *Tuomey*[3]) and should draw boards' attention for that reason alone. Also worthy of board attention is the duration of the controversy; the implicated employment contracts were first introduced in 2003, and the whistleblower, Dr. Drakeford, was initially offered the proposed arrangement in 2005. After some attempt at negotiating the terms, including the joint engagement by Dr. Drakeford and *Tuomey* of an experienced Stark Law outside counsel to assess the arrangement, Dr.

Drakeford declined to enter into the arrangement. He subsequently filed his FCA complaint later in 2005 — and 10 years of investigation and litigation ensued.

Imagine the organizational distraction arising from such a long-running, contentious dispute with the government, and the corresponding reputational damage to the organization — factors clearly of concern to any board. Collectively, these facts should help inform the board's perspective on the significance of the Stark Law and its prominence as a strategic risk factor. It should also help to change the minds of those within an organization who may have historically dismissed the risk of Stark Law violations, considered them a necessary “cost of doing business” or would downplay the impact of Tuomey using a “bad facts make bad law” argument.

There are 237 million reasons why a Tuomey overview should be on a future board agenda — a discussion of what the law says; its associated penalties (and the connection to the FCA); the extent to which it is enforced; by whom it is enforced; and the implications of having to decide whether to engage in active litigation to defend against a Stark Law-FCA investigation.

The Impact of Impenetrability

The Tuomey opinion, especially the concurring opinion, makes clear the Fourth Circuit's concern with the complexity and fairness of the Stark Law, “an impenetrably complex set of laws and regulations.”[4] Yet, the board can take no comfort from these observations by the bench. Indeed, they should serve as a call to action in terms of the level of review that could be applied to transaction proposals that present material risk. Many arrangements entered into between a health system and physicians implicate this law. The fact that two members of the Tuomey judicial panel viewed with great concern the complexity of the law should place an attentive board on notice. If they are critical of the law's complexity, what does that suggest about what our response should be?

How does a board position an organization to deal with a law that “has become a booby trap rigged with strict liability and potentially ruinous exposure?”[5] Such a characterization doesn't excuse a board from a diligent oversight process; rather, it should mobilize a board to assure a review process worthy of the Stark Law's challenges, with a board direction that management develop robust procedures for the development and compliance evaluation of proposed physician arrangements. There should be periodic board supervision of the effectiveness of those procedures. There should also be direct board review of extraordinary proposals, with a process that reflects an organizational commitment to compliance with the law.

The Tuomey decision speaks often to how the record presented several red flags in the proposal development and negotiation process. How does a board respond? For health systems interpreting Tuomey, the highly critical characterization of the Stark Law should serve as a separate red flag to governance with respect to the sufficiency of internal legal review.

Relying on Reliance

A more tactical concern of a health system board is how to structure its relationship with and reliance on legal counsel in connection with management-board review of proposals that implicate the health care fraud laws. One of the most noteworthy aspects of Tuomey was its rejection of the health system's “reliance on advice of counsel” defense (to the allegation that it had acted “knowingly” to submit false claims to Medicare because of the court's perception that Tuomey had not given sufficient weight to the legal advice provided by Kevin McAnaney). This has created substantial concern within the health law bar about the risks associated with the heretofore normal process when a health system seeks more than one opinion on the same legal issue and conflicting legal conclusions are reached among the final opinions.

Tuomey also highlights the risk associated with withholding relevant facts about a proposal from counsel from whom advice is requested. Given those controversies, Tuomey upends the traditional dynamic by which a board relies in the ordinary course on the advice of outside counsel when asked to review and approve transactions with legal implications.

The board is now on notice, if it was not already, of the need to exercise more constructive scrutiny with respect to the legal advice proffered in support of a proposal. Is the firm providing the advice of a recognized expert in the field? What does the opinion actually say? Did the law firm have the benefit of all of the relevant facts? Were there any disclaimers or caveats? Has any legal advice been given that conflicts with the opinion? What is the process for breaking ties when there is a conflict of opinion? What is the gradation of risk identified in the advice and what are the practical organizational implications of that risk? It's not enough, if it ever was, for a check-the-box "Has legal counsel signed off on this?" inquiry from the board. Are there situations when the board needs its own counsel on such matters? The general counsel must lead the board in a detailed discussion of the limitations of the "advice of counsel" defense post-Tuomey.

A Board's Own Risk Profile

The average board member, having been briefed on Tuomey, could logically be expected to raise concerns with respect to his or her own liability profile in similar situations. Yet, as a general matter, it is very rare that health care governing board members are held responsible for civil or criminal violations of the law, whether for their own conduct, or for conduct associated with the activities of the organization. This is especially the case with respect to voluntary board members of nonprofit health systems. Indeed, the author is unaware of any action in which an enforcement agency has sought to hold health system board members personally liable for noncompliant physician alignment arrangements. [6] Nevertheless, this is an understandable concern, especially when, as in Tuomey, the deliberations of the board became a matter of judicial record.

For example, a Sept. 3, 2013, opinion of the South Carolina attorney general concluded that Tuomey officers and trustees could not be indemnified for penalties associated with the May 8, 2013, jury verdict in the case.[7] It was in the context of that verdict that the opinion was sought from the state attorney general on the ability of a charitable, nonprofit corporation (i.e., Tuomey) to indemnify its officers and trustees from litigation-associated penalties. According to the state attorney general, indemnification would be inappropriate where the officers and directors had not been named as defendants and thus were not compelled to pay damages, as was the circumstance at the time the opinion was issued. In other words, the indemnification issue was not ripe. [8]

Care should be taken not to draw generalizations or conclusions from the state attorney general's opinion on liability exposure for problematic board compliance oversight. However, the issuance of the opinion, regardless of its limited application, may prompt a broader boardroom discussion about directors' access to indemnification and insurance protections, particularly in situations where, like the Tuomey case, the role of the board in its oversight of physician contracting arrangements was a matter raised by the government:

It is Tuomey's own management and board who are responsible for permitting the damages and penalties to amount to the level ultimately found by the jury. Tuomey's executives and management decided to throw caution to the wind and refused to terminate the contracts until the first jury declared them illegal.[9]

Conclusion

Some observers will likely dismiss the Tuomey decision as an extreme result premised on highly unique

facts. That's easy to understand, given the facts and circumstances underlying the controversy. But ultimately, Tuomey becomes hard to ignore, given the extent to which the role of the board became such a significant part of the record. It becomes even harder to ignore given the valuable governance lessons on oversight, checks and balances on management proposals and availability of the "reliance on counsel" defense arising from that record. For those reasons, the decision merits a board briefing from the general counsel, and perhaps also a review of the sufficiency of current board protocols on the evaluation and approval of Stark Law-implicated proposals.

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[1] United States ex rel. Michael K. Drakeford, M.D. (Fourth Circuit, No. 13-2219); July 2, 2015.

[2] See, e.g., In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch.1996).

[3] Lisa Schencker, "\$237 million Tuomey judgment upheld by federal appeals court"; Modern Healthcare, July 2, 2015.

[4] Tuomey, at 54.

[5] Tuomey, at 67.

[6] See, e.g., Peregrine, DeJong and Buchman, "Physician Alignment Proposals: Board Evaluation Guidelines"; 18 HFRA 433, May 14, 2014.

[7] Letter of Alan Wilson, Attorney General of South Carolina, to The Honorable J. Thomas McElveen, III (Sept. 3, 2013).

[8] Id., see also, Peregrine, DeJong and Buchman, *supra*.

[9] Drakeford v. Tuomey Healthcare System Inc., Reply in Support of United States' Motion For Entry of Judgment Under The False Claims Act (Filed June 24, 2013) (Pages 20, 21).