

# Super-Sized Stark Law Liability: Tuomey Subject to False Claims Act Liability After Jury Finds Physician Employment Agreements Violated Stark Law

After a four-week trial, a federal jury concluded on Wednesday that Tuomey Healthcare System violated both the Stark Law and the False Claims Act by submitting \$39 million worth of illegal claims to Medicare. The case was initiated in 2005 by a whistleblower—an orthopedic surgeon—who brought the case after he declined to enter into a part-time employment arrangement with Tuomey. He alleged that Tuomey violated the Stark Law by paying 19 specialists in a way that rewarded them for their referrals and violated the False Claims Act by submitting claims to Medicare for services referred by those specialists. While the financial penalty to be imposed on Tuomey has not yet been determined, the decision provides some important takeaways for hospitals and health systems, especially as it relates to compensation arrangements with employed (and non-employed) physicians.

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## Background

Tuomey allegedly entered into the part-time physician employment contracts at issue in the case in response to fears that the specialists planned to divert outpatient procedures to a competing ambulatory surgical center. Each contract had a ten-year term, covered only certain outpatient procedures and contained a noncompete clause that prohibited the specialists from performing those outpatient procedures at any location within 30 miles of the hospital during, and for two years after termination of, the contract. Compensation payable under the contracts included a base salary (based upon the previous year's collections or procedures), a productivity bonus (80% of the physician's collections for personally performed services) and an incentive bonus (up to 7% of the productivity bonus). The specialists also received various fringe benefits under the contracts not typically offered by Tuomey to part-time employees. The government argued that the total compensation actually received by the physicians exceeded their collections for personally performed services and that this additional compensation was evidence that the physicians were being compensated based on the volume or value of their referrals.

## Key Takeaways

The decision underscores the tremendous risk created by Stark Law violations. It may also create increased interest on the part of federal prosecutors in pursuing False Claims Act cases based on Stark Law violations. In response to this decision, hospitals and health systems may want to consider undertaking the following proactive measures:

- **Assess Current Stark Law Compliance.** Hospitals and health systems should work with their counsel to verify that each of these requirements is being met. In doing so, careful attention should be given to part-time employment arrangements. Tuomey underscores the particular risks that exist for this type of arrangement.
- **Review Fair Market Value Policies and Procedures.** Hospitals and health systems should re-evaluate their existing policies and procedures for determining and documenting fair market value. Particular attention should be paid to whether arrangements are consistent with other arrangements being entered into in the market. Hospitals and health systems are advised to work with legal counsel prior to retaining outside valuation consultants to ensure that the valuation process is subject to attorney-client privilege.
- **Evaluate Effectiveness of Current Compliance Reporting Mechanisms.** Many whistleblowers report that they pursued outside assistance only after an unsuccessful attempt, or attempts, to resolve the issue within the organization. Hospitals and health systems need to review and evaluate the effectiveness of current compliance reporting mechanisms and whistleblower protections, as well as their overall compliance culture. Having a well-documented and readily available reporting mechanism will not serve to encourage reporting if the organizational culture does not support and protect individuals who raise issues. Many organizations are surprised to learn that concerns are never brought to the attention of the compliance officer due to employees' fears that such action would be viewed negatively by their immediate supervisors.

The Health Care team at Reinhart Boerner Van Deuren s.c. is available to assist you with any of the aforementioned proactive measures. Please feel free to contact your Reinhart attorney, [Heather Fields](#) or any other member of Reinhart's Health Care team to discuss any questions or concerns related to your organization.



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