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Health Care Law Alert

Federal Government Gets Second Chance at False Claims Liability for Regulatory Noncompliance

BY MARCUS C. HEWITT

The federal government will get a second trial in an ongoing Federal False Claims Act whistleblower suit brought in late 2005 against Tuomey Healthcare System, Inc. in Sumter, S.C. (U.S. ex rel, Michael K. Drakeford, M.D. v. Tuomey d/b/a Tuomey Healthcare System, Inc., U.S. Dist. Ct., D. S.C., Case No. 3:05-CV-2858-MJP). The case may have repercussions for all healthcare providers that bill Medicare and Medicaid, since the claims against the hospital are largely based on the alleged false certification that the hospital complied with regulatory requirements.

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The False Claims Act (31 USCA §§ 3729-3733) imposes civil liability and penalties for all payments resulting from "false or fraudulent claims" and other false records or statements to obtain payment from the federal government. In the typical False Claims Act suit, a provider is alleged to have overbilled or charged the government for goods or services that were not provided. However, in the Tuomey case, the government's case is based on allegations of regulatory noncompliance – specifically, the government has alleged that services provided by physicians and billed to the government violated the Stark law. The same principle could be applied to other healthcare providers billing government payors, since government reimbursement is conditioned on various certifications of regulatory compliance and reporting of information by providers. Accordingly, a government determination that a provider does not comply with a regulation or that the provider furnished erroneous information could result in massive civil penalties and financial liability under the False Claims Act.

The Tuomey suit stems from allegations that the hospital's compensation of certain physician employees violated the federal Stark law. The physician whistleblower and the government argue that claims for payment for services by these physicians (totaling approximately $44.8 million) were, therefore, false claims, for which Tuomey should be liable for treble (triple) damages, plus statutory penalties of $5,500 to $11,000 per violation.

The case was heard by a jury in March 2010, which found that Tuomey violated the Stark law, but that there was no violation of the False Claims Act; and the court has ordered Tuomey to repay the government $44.8 million plus interest of approximately $4 million (The hospital is appealing this judgment).

Despite the large judgment against it, the hospital's victory on the False Claims Act issue appeared to have cut off the possibility of damages in excess of the $44.8 million billed. However, the hospital suffered another blow on June 3, when the Court announced its decision to grant the whistleblower and the govern-

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ment a new trial on the False Claims Act claim alone because the Court determined that it had improperly excluded evidence during the trial.

The new trial date on the False Claims Act claim has not been set. The retrial should be watched closely as it could set a high-profile precedent in the Fourth Circuit for healthcare provider false claims liability based on regulatory non-compliance.

For more information about this topic, please contact the author or any member of the Williams Mullen Health Care Team.

For an earlier article discussing the details of the suit in more detail, see: Recent Cases Expanding False Claims Act Liability for Stark Violations.

[1] N.C. Gen. Stat. § 131E-186. The review criteria are set forth in N.C. Gen. Stat. § 131E-183(a), and the CON rules set forth in 10A NCAC 14C.0100 *et seq.*

[2] N.C. Gen. Stat.§ 131E-183(a)(6).