A Stark Reality: Lessons from the Halifax and Tuomey Cases

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Framework for understanding Tuomey & Halifax

- The False Claims Act (FCA), 31 U.S.C. § 3729 et seq., provides for liability for triple damages and a penalty from $5,500 to $11,000 per claim for anyone who knowingly submits or causes the submission of a false or fraudulent claim to the United States.

- Seven forms of misconduct give rise to civil liability under section 3729. They occur when anyone:
Framework (cont’d)

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
Framework (cont’d)

• (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

• (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
Framework (cont’d)

- (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government ... who lawfully may not sell or pledge property; or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, 31 U.S.C. 3729.
Framework (cont’d)

• In recent years, courts have let *qui tam* plaintiffs bootstrap violations of the federal Anti-kickback Statute (42 U.S.C. § 1320a-7b(b)) and the Stark law (42 U.S.C. § 1395nn) into False Claims Act (FCA) violations even though Congress didn’t provide for a private cause of action under either of those laws.
Framework (cont’d)

• The heightened pleading standards for fraud cases as set out in FED. R. CIV. P. 9(b) require a plaintiff to allege, with *particularity*, the circumstances that constitute fraud or mistake: *i.e.*, the “who, what, when, where, and how” of the misconduct charged *and* why it’s false.
Framework (cont’d)


• Now, when federal judges analyze whether a complaint can survive a motion to dismiss, they must determine if the complaint includes sufficient, non-CONCLUSORY factual allegations to demonstrate the *plausibility* of the claim.
In the FCA realm, many courts accept the so-called “tainted claims” and “false certification” theories of liability, which lower plaintiff’s burdens of proof. See generally, Michael E. Clark, Whether the False Claims Act is a Proper Legal Tool for the Government to Use for Improving the Quality of Care in Long-Term Care Facilities, 15 NO. 1 HEALTH LAW. 12, 12 (2002).
Although the Stark law basically is a strict liability regime—under which a party’s intent generally isn’t relevant (now subject to a few exceptions), courts have been willing to find that violations of Stark law satisfy the otherwise heightened pleading and proof requirements for fraud (which is an ill-founded proposition in my eyes).
Framework (cont’d)

Framework (cont’d)

- The Fraud Enforcement Recovery Act of 2009 ("FERA") broadened the scope of the FCA’s false claims provision to encompass retained overpayments.
- As amended by FERA, the FCA prohibits “knowingly and improperly avoid[ing] ... an obligation to pay” the government—even without being coupled with a false statement to conceal the obligation (31 U.S.C. § 372(a)(1)(G))
Framework (cont’d)

- Following FERA, the FCA now expansively defines an “obligation” to include a duty to pay the government that arises “from the retention of any overpayment.” 31 U.S.C. § 3729(b)(3).

- FERA legislatively overruled *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008), which held that, in order to establish liability under the FCA’s provisions, a plaintiff must prove that a defendant intended for the government *itself* pay the claim. See S. Rept. No. 111-10, at 10 (2009), quoting *Allison Engine*, 128 S.Ct. at 2128.
Framework (cont’d)

• In so doing, Congress transformed the FCA in what the *Allison Engine Court said it was not (before the amendments): an “all-purpose antifraud statute.”* FERA also expanding the definition of what constitutes a “claim” made to the government and facts that are “material” to the government’s payment of a claim. See Michael E. Clark, *On The Front Lines: RACs and HEAT and TARP – Oh, My! – Part 1*, 4 CCH Health Care Compliance Letter (Nov. 3, 2009)
• Knowledge under the FCA is defined broadly as “actual knowledge ... deliberate ignorance of the truth [or] reckless disregard of the truth.” 31 U.S.C. § 3729(b).

• Under the FCA’s revised reverse false claims provision, a provider’s discovery that its practices led to overpayments consequently can give rise to liability for the total amount of the overpayments regardless of whether they have been quantified.
The Patient Protection and Affordable Care Act of 2010 (PPACA), which took effect on March 23, 2010, further clarified the “improper retention” theory by requiring that an overpayment be reported and returned within 60 days after it is identified.
Tuomey

- The government alleged that from January 2005, and for some time thereafter, the hospital presented false claims to the U.S. by submitting Medicare claims that were in violation of the Stark Law.
- The false claims sought reimbursement for services rendered to patients referred by physicians with whom Tuomey had entered into financial relationships (compensation relationships) that violated the Stark Law.
Tuomey (cont’d)

• In particular, the government contended that Tuomey and these physicians were parties to compensation arrangements that varied with, or took into account, the physicians’ actual or anticipated referrals to Tuomey from the referrals they made to the hospital.
Tuomey (cont’d)

• In defense, Tuomey contended that the contracts at issue met an applicable exception to Stark;

• Tuomey also claimed that even if an exception to Stark didn’t apply (i.e., if a FCA violation occurred), it shouldn’t be held liable because the entity relied on the advice of counsel.
Tuomey (cont’d)

- Under the Stark Law, physicians who have a financial relationship with a hospital are prohibited from making a referral to that hospital for the furnishing of certain designated health services for which payment otherwise may be made under the Medicare program.
Tuomey (cont’d)

• In addition, under the Stark law, a hospital may not submit a Medicare claim for services for payment if it has been rendered pursuant to a prohibited referral. This holds true even if the service otherwise properly was reimbursable under Medicare—subject to certain financial relationships that comprise exceptions to the Stark Law. At issue in this case were the bona fide employment agreement exception and the indirect compensation exception.
Tuomey (cont’d)

• As to proof of the falsity of the claims at issue, the judge instructed the jury that:
  – The government alleges that certain of Tuomey’s claims to Medicare for reimbursement were false because Tuomey was in violation of the Stark Law. Claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the [FCA]. However, if a defendant has violated a statute that the government has made a condition of payment, such as the Stark Law, then the defendant submits a false or fraudulent claim. For purposes of this case, a claim is false if it was submitted to Medicare in violation of the Stark Law.
Tuomey (cont’d)

As to the proof of Corporate Knowledge, the judge instructed:

– Tuomey is a corporation. ... [T]o find that Tuomey took any action knowingly, you must find that at least one individual employee had all of the relevant factual information to satisfy the “knowledge” standard under the [FCA]. ...  

– [T]hat means that you would need to find that at least one individual employee of Tuomey knew that [it] was submitting [false] claims to Medicare ...
As to Tuomey’s affirmative defense that it relied on the advice of counsel, the judge instructed the jury that:

– Tuomey cannot rely on the advice of counsel defense if it did not disclose full and accurate information, including all material facts, to its attorneys. If you find that Tuomey avoided its duty to disclose full and accurate information to its attorneys ... then you should find that Tuomey cannot prevail on its affirmative defense of advice of counsel.
Tuomey (cont’d)

• **The Result:**
  “After eight years of fierce legal confrontation with the federal government, board members at Tuomey Healthcare System in Sumter, S.C., lack a permanent CEO, owe on junk-status bonds and face the highest penalties levied against a community hospital in a case involving overpayments to doctors.”

Halifax

• “The Halifax lawsuit ... filed in 2009 by a compliance officer at the ... hospital, claims that six oncologists and three neuro-surgeons took home paychecks that increased when they referred more patients for treatments. The whistleblower ... also says the neurosurgeons were illegally overpaid.”

Joe Carlson, $1 billion Stark case against Fla. Hospital headed to trial, Modern Healthcare (Nov. 25, 2013)
Halifax (cont’d)

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Halifax (cont’d)

• “Federal prosecutors have laid out a hair-raising upper limit on Halifax' potential damages in the case: as much as $1.1 billion, if a jury next March reaches a worst-case scenario for the hospital that 75,000 of its Medicare claims were tainted because they involve care provided by the nine doctors between 2005 and 2008.

Joe Carlson, $1 billion Stark case against Fla. Hospital headed to trial, Modern Healthcare (Nov. 25, 2013)
Halifax (cont’d)

• In analyzing the issues on the Government’s Motion for Partial Summary Judgment, the court noted that:
  – It is undisputed that the Medical Oncologists had a financial relationship with Halifax Hospital. Because of this, the burden shifts to Halifax Hospital to show that the compensation arrangement with the Medical Oncologists fit within one of the Stark Law’s exceptions.
Halifax contends that the Medical Oncologists’ compensation arrangement satisfied the exception for bona fide employment relationships.

Because the Medical Oncologists were employed by Halifax Staffing rather than Halifax Hospital (which submitted the Medicare claims), there is some dispute as to whether the exception for bona fide employment relationships could apply.
Halifax (cont’d)

– The Government contends that the requirements of this exception were not satisfied because the Incentive Bonus, and therefore the Medical Oncologists’ remuneration, varied based on referrals for [DHS]. ...

– [T]he pool from which the Incentive Bonus was drawn was equal to 15 percent of the operating margin of the Medical Oncology program, and the program’s revenue included fees for [DHS] such as outpatient prescription drugs and outpatient services not personally performed by the Medical Oncologists.
Halifax points out that the requirement in the bona fide employment exception that the remuneration not be “determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician,” 42 U.S.C. § 1395nn(e)(2)(B)(ii), is itself subject to an exception.
– The final sentence of 42 U.S.C. § 1395(e)(2) provides that “[s]ubparagraph (B)(ii) shall not prohibit the payment of remuneration in the form of a productivity bonus based on services performed personally by the physician (or an immediate family member of such physician)”. The Incentive Bonus, the Defendants argue, was just such a bonus, because “it is undisputed the bonus pool was divided up based on [each] oncologist’s personally performed services.”
Halifax (cont’d)

– This is not enough to bring the Incentive Bonus within the bona fide employment exception. The Incentive Bonus was not a “bonus based on services personally performed” by the Medical Oncologists, as the exception requires. 42 U.S.C. § 1395(e)(2). Rather, ... this was a bonus ... divided up based on services personally performed by the Medical Oncologists. The bonus ... was based on factors in addition to personally performed services -- including revenue from referrals made by the Medical Oncologists for DHS.
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Takeaways

• *Tuomey* and *Halifax* illustrate the risks not only for the regulated community, but also for transactional attorneys who assist by providing fraud and abuse advice about how to structure arrangements to meet safe harbors and exceptions to the Stark law and the federal Anti-Kickback Statute.
Takeaways (cont’d)

• To the extent that they have provided opinion letters that turn out to be wrong, or otherwise haven’t been properly qualified, these health law attorneys—and their law firms—risk being sued by angry clients if similar enforcement actions are successfully brought.
Takeaways (cont’d)

• Whether this will result in larger firms limiting the ability of their health lawyers to provide such services, while debatable, is one foreseeable consequence of these decisions.
Takeaways (cont’d)

• *Tuomey* demonstrates the incredible risks presented by exercising the constitutional right to hold the government to its proof since the result is so draconian—not just the treble damages that follow from being found liable, but also the threat of permission exclusion.
These truly are “bet the company” cases. I view the decision to try the *Tuomey* case (twice) as pretty analogous to a “Hail Mary” pass in a football game.
ABA Stark & AKS Toolkit

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For more information, please visit http://starktoolkit.americanbar.org or contact Simeon Carson, Associate Director, at simeon.carson@americanbar.org or 312-988-5824.
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