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TOUMEY LOSES STARK/FCA CASE AGAIN

Jury verdicts in False Claims Act litigation are rare. Two in the same case are rarer still. On May 8, 2013, after just over four hours of deliberation, a jury in the Federal District Court of South Carolina returned a verdict for the Government, finding that the Tuomey Healthcare System violated both the Stark law and the FCA. The jury returned a judgment for the Stark violations totaling $39.3 million. The parties will now have to submit proposals regarding what FCA damages are appropriate, with a verdict potentially reaching nearly $357 million (or, more likely, reach a post-verdict settlement). This potential award is the sum of treble damages for the violations themselves ($117.9 million) and the maximum punitive award of $11,000 for each of as many as 21,730 claims ($239 million).

The Government's allegations stemmed from employment agreements that included noncompete clauses that Tuomey entered into with 19 physicians. The Government alleged these agreements paid more than the fair-market value for the provided services and improperly required that the physicians direct referrals to Tuomey.

Tuomey's defense throughout both trials was that the contracts were valid and permissible under federal laws and regulations and that it relied in good faith upon advice of counsel Here Be Dragons - Regulatory Law and the Advice-of-Counsel Defense regarding Stark law compliance.

Toumey argued that its counsel had advised that the arrangements with the physicians were compliant. However, the Government presented evidence that, as of 2005, Tuomey was advised by a legal consultant that the arrangements were problematic, and that Tuomey disregarded the advice, dismissed the consultant and continued with the problematic arrangements in place.

The Government provided two alternative paths to a favorable judgment. The Government asked for over $44 million if the jury rejected Tuomey's pre-2005 defense that it acted on advice of counsel or, in the alternative, $39.3 million if the jury accepted Tuomey's defense until it rejected advice in 2005 that the arrangements may be noncompliant. Given the jury's verdict, it appears the 10 jurors chose the second option, accepting Tuomey's defense in part.

In 2010, this same matter was before a different jury. The first found Tuomey had violated the Stark law but not the FCA. A judgment was entered by the Court for $45 million for repayment of the reimbursed Medicare claims. The ruling was later vacated by the 4th Circuit Court of Appeals and sent back to the Court for a retrial.

Tuomey is a regional, 301-bed hospital system that reported $7.2 million of profit in 2010. The consequences from this verdict could prove devastating for the hospital. The overwhelming financial penalties could be combined, by the Government, with decertification from the Medicare and Medicaid programs, ensuring Toumey's demise as a health care provider.

Tuomey's lessons reach beyond the Stark law and FCA risks with fair-market-value employment agreements and noncompete clauses. Tuomey stands as a sobering reminder of the high stakes that face health care providers in FCA litigation, the significant risks associated with treble and punitive damages that can result from proceeding to trial, the "death penalty" risk of decertification and a newly emboldened Department of Justice.

Should you have any questions, please contact Drew Howk at ahowk@hallrender.com or 317- 429-3607.

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