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Organization & Individual Liability: Strategies for Managing Risk

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Organization & Individual Liability: Strategies for Managing Risk

- Historical trends and examples of enforcement against individuals and health care organizations
- Managing the risk and best practices for individuals and health care organizations

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Responsible Corporate Officer Doctrine

- *U.S. v. Dotterweich and U.S. v Park* (1975) original established Responsible Corporate Officer Doctrine
- Corporate misconduct and violations of law can result in conviction of organization executives without individual involvement in wrongdoing or even knowledge that wrongdoing was taking place
  - Recent application in cases involving violations of law which protects the health and safety of Medicare and Medicaid Program beneficiaries (i.e. Purdue Frederick, Inc. – promotion of "off-label" use of Oxycontin)
  - Individual criminal (i.e. plea to misdemeanor conviction), civil (i.e. individual multi million dollar fines) and administrative (Federal health program exclusion) liability for CEO, GC and CMO
- Individual criminal and civil and administrative liability against Purdue executives not based on personal involvement or even knowledge of organization wrongdoing
- Based on Responsible Corporate Officer doctrine whereby each executive had "responsibility and authority to prevent or to promptly correct the organizational misconduct

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Responsible Corporate Officer Doctrine and Program Exclusion

- Responsible Corporate Officer Doctrine – Strick liability application – without need for stabling personal involvement in wrongful conduct – criminal and administrative liability – misdemeanor and exclusion
- Pharma and Medical Device Industry for violations of Food, Drug & Cosmetics Act (Purdue Frederick and Synthes, Inc.)
- Exposure for health care organization and Board Members and upper level management
  - Responsibility for and authority to prevent or correct non-compliant activity
- Federal Health Care Program Exclusion also based on Responsible Corporate Officer Doctrine
  - No knowledge of or participation in core activity
  - Twelve year exclusion of CEO, GC, CMO upheld. See *Freidman v. Sebelius*, 2010 U.S. Dist. Lexis 131465 (D.D.C. December 13, 2010)

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Responsible Corporate Officer Doctrine and Program Exclusion (Cont'd.)

- Board Members – knew or should have known; Managers – strict liability
  - Sufficient nexus and common sense connection to misconduct
  - Individual exclusion liability based solely on position in organizational hierarchy
  - See Guidance for Implementing Permissive Exclusion Authority under Section 1128(b)(15) of the Social Security Act; available at http://oig.hhs.gov/fraud/exclusions/asp.

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Broad Application and Additional Actions Against Individuals

- Criminal, civil and administrative liability based on Responsible Officer Doctrine can be applied for organizational violations of the Anti-Kickback and Self-Referral laws and/or the submission of false and fraudulent claims
- Corporate Integrity Agreements have already required individual responsibility and accountability for management officials, business unit managers and Chief Compliance Officers (i.e. Pfizer and Astra Zeneca)

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Broad Application and Additional Actions Against Individuals (Cont'd)

- Individual liability under criminal statutes, the False Claims Act and Civil Money Penalty and Exclusion authorities
  - *U.S. v. Sulzbach* (i.e. General Counsel and Compliance Officer)
  - *OIG v. Montijo* (i.e. physician arrangements with medical device companies)
  - *OIG v. Baskt* (i.e. Stark law violations by CEO of Hospital)
  - *U.S. v. Lauren-Stevens* (i.e. criminal prosecution of General Counsel at Glaxo Smith-Kline)
  - *Denkel v. OIG* (i.e. exclusion of owner of diagnostic imaging company)
- DOJ Policy on Individual Accountability for Organizational Wrongdoing

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STARK AND ANTI-KICKBACK CASES AND SETTLEMENTS

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United States ex rel. Kosenske v. Carlisle HMC, Inc., 554 F.3d 88 (3rd Cir. 2009)

- Anesthesiologist brought *qui tam* action under FCA, alleging hospital and owners submitted outpatient hospital claims to Medicare and other Federal healthcare programs that falsely certified AKS and Stark Compliance
- 3rd Circuit reversed summary judgment in defendants' favor and found that exclusive service arrangement for pain management services between Relator's former practice (Blue Mountain Anesthesia Associates) and defendants (1) triggered Stark and AKS; and (2) did not meet the personal service exception to either statute.
- In 1992, Hospital and BMAA entered Anesthesiology Services Agreement:

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***United States ex rel. Kosenske v. Carlisle HMC, Inc.*, 554 F.3d 88 (3rd Cir. 2009) (Cont'd.)**

- Hospital would provide space, equipment and supplies at no charge and allow only BMAA physicians to provide anesthesia or pain management services at Hospital;
- BMAA would provide anesthesia coverage for hospital patients 24/7 and use personnel, space, equipment and supplies provided by Hospital solely for practice of anesthesiology and pain management for Hospital's patients; and
- BMAA physicians would not practice anesthesia or pain management at any other location other than the Hospital or other facilities/locations operated by Hospital et al

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***United States ex rel. Kosenske v. Carlisle HMC, Inc.*, 554 F.3d 88 (3rd Cir. 2009) (cont'd.)**

- In 1998, Hospital opened a pain management clinic and BMAA began providing pain management services to its patients. Hospital did not charge BMAA rent for the space or equipment, or a fee for support personnel provided by Hospital. Parties did not execute a new agreement.
- **Lessons**
  - **Have (and update as necessary) a written agreement.** The only written agreement between parties was executed in 1992 and did not address pain management services later provided at a facility opened after the Agreement was signed. Nor did it address the free hospital space, staff or facilities provided to BMAA

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***United States ex rel. Kosenske v. Carlisle HMC, Inc.*, 554 F.3d 88 (3rd Cir. 2009) (Cont'd.)**

- **Beware non-monetary remuneration**. The exclusive right to provide services and in-kind remuneration can also trigger AKS.

- The District Court heard the case on remand and denied the parties' renewed cross-motions for summary judgment, finding numerous disputed issues of fact. (*United States ex rel. Kosenske v. Carlisle HMA Inc.*, 2010 U.S. Dist. LEXIS 31619 (W.D. Pa. 2010).

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United States v. Borrasi
639 F.3d 774 (7th Clr. 2011)

- Seventh Circuit Court of Appeals upheld Dr. Roland Borrasi's conviction for violations of the Anti-Kickback Statute and joined other circuits in adopting the "one purpose" test.
- "One purpose" test: a payment or offer of remuneration violates AKS so long as *part* of the purpose of a payment to a physician or other referral source by a provider or supplier is an inducement for past or future referrals.
- Administrators of an inpatient psychiatric hospital (Rock Creek Center, L.P.) paid Dr. Borrasi and colleagues bribes to refer Medicare patients. Between 1999 and 2002, Dr. Borrasi, et al received $647,204 in potential bribes. In 2001 alone, they referred 484 Medicare patients to Rock Creek

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United States v. Borrasi
(Cont'd.)

- Dr. Borrasi, et al were placed on the Rock Creek payroll, received false titles and job descriptions, and submitted false time sheets. They were not expected to perform any of the duties listed in their job descriptions and attended very few meetings at Rock Creek.
- Dr. Borrasi and certain Rock Creek administrators were charged with conspiracy to defraud the U.S. Government and Medicare-related bribery. Dr. Borrasi was found guilty and sentenced to 72 months in prison, two years of supervised release and $497,204 in restitution.

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United States v. Borrasi
(Cont'd.)

- He appealed his conviction, arguing that AKS exempts "any amount paid by an employer to an employee (who has bona fide employment relationship with such employer) for employment in the provision of covered items or services."
- He urged the Court to adopt a "primary motivation" doctrine: if, upon examining the defendants' intent, the trier of fact found the *primary motivation* behind the remuneration was to compensate for bona fide services provided, the defendants would not be guilty.
- The Court declined, adopted the "one purpose" test and held that "[b]ecause at least part of the payments to Borrasi was "intended to induce" him to refer patients to Rock Creek, the statute was violated, even if the payments were also intended to compensate for professional services."

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United States v. Borrasi
(Cont'd.)

- What does Borrasi mean for interpreting the employment exception and Safe Harbor?
- Will Borrasi limit the protections of the employment exception and Safe Harbor?
- But see *U.S. ex rel. Baklid-Kuntz v. Halifax Hospital Medical Center (November 26, 2013, M.D Fla.) – Rejects "One Purpose Test" for employee exception*
  - *"One Purpose Test" eviscerates employer/employee exception to Anti-Kickback Statute even if payments are to a "legitimate" (i.e. bona fide) employee*

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United States ex rel. Baklid-Kunz v. Halifax Medical Center
(M.D. Fla.)

- Halifax Hospital is in Daytona Beach, Florida
- In 2014, paid $86 million to settle alleged Stark Law and Anti-Kickback violations, brought by a *qui tam* Relator.
  - The Relator was a Halifax compliance officer turned whistleblower.
  - Hospital/Physician Compensation Arrangements
- The government alleged that the prohibited referrals resulted in the submission of 74,838 claims and overpayment of $105,366,00.

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United States ex rel. Baklid-Kunz v. Halifax Medical Center
(M.D. Fla.) (Cont'd)

- Executed contracts with six medical oncologists that included an incentive bonus that improperly included the value of prescription drugs and tests that the oncologists ordered and Halifax billed to Medicare.
  - Bonus Pool = 15% of Halifax Hospital's "operating margin" from outpatient medical oncology services (*i.e.*, pool includes revenue from "designated health services" referred by oncologists)
  - Does not comply with Employment Exception (1) FMV and (2) Volume/Value referral prohibition
  - Share of pool paid to individual oncologists is based on each individual physician's personal productivity, not referrals
  - However, pool includes "profits" from services referred, but not personally performed by oncologists.

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

- Paid three neurosurgeons more than fair market value for their work.
  - Bonus = 100% of collections after covering base salary, no expense sharing
  - Total Compensation = As much as double neurosurgeons at 90th percentile of FMV.

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

- Relator filed *qui tam* alleging Stark Law and AKS violations and that hospital improperly billed short-stay cases
- Government intervened in Stark Law allegations
  - Bonus payments to six oncologists that allegedly varied with or took into account volume/value of referrals
  - Compensation to three neurosurgeons set at 100% of collections with a guaranteed minimum was in excess of FMV and took into account volume/value of referrals

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

Halifax – Oncologists' Arrangement

- New Compliance Officer attended HCCA conference in 2008 and after returning concluded that the oncology arrangements violated Stark Law
- Compliance Officer sent memo to Associate General Counsel expressing her views
- GC sought advice of outside counsel in October 2008
- February 2009, outside counsel opined:
  - The bonus arrangement does not take into account, or vary with, volume or value of referrals or other business generated by the physicians
  - What matters is that the bonus pool was not allocated based on volume or value of referrals
  - This conclusion was essential to satisfying the employment exception
  - "[We] believe thee is a reasonable argument that the Contingent Bonus qualifies for the … exception. However, given the preamble language set forth above, we cannot provide any assurances that CMS or a court would more likely than not concur with that analysis".
- June 2009 – *qui tam* filed

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

Halifax-DOJ motion for partial summary judgment on claims based on oncologists' arrangements

- DOJ: the bonus payments to oncologists were an indirect compensation relationship and did not fit an exception
- Evidence hospital acted "knowingly"
  - Former Compliance Officer sent internal Stark Law informational memos in 2001 and 2004
  - Compliance Officer
  - Outside counsel's memo too weak to rely upon
  - Prospective change to neurosurgeons' agreement
- Sought summary judgment of about $350 million

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

Halifax's Response to Motion to Summary Judgment

- Bonus did not vary with volume or value of referrals for reasons stated by outside counsel, that what matters is how the bonus pool is allocated
- Argued that there was a direct compensation arrangement, apparently to enable it to argue that bonuses may be based on physician's personally performed services
- Hospital did not act "knowingly" because it relied on advice of counsel

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

Halifax – Court grants Government's summary judgment in part (11/13/13)

- Direct or indirect compensation analysis not resolved
- Hospital violated the Stark Law – oncologists' bonuses varied with, and took into account, value or volume of referrals
- Outside legal opinion is irrelevant to common law claims, since Stark Law is strict liability
- Physician's inclusion as "attending" or "operating" physician on UB-04 is evidence of a referral
- Grants partial SJ as to liability on common law claims

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

Halifax – Ruling on Government's MSJ

- Denies summary judgment on FCA claims because of genuine issue of material fact as to whether Hospital acted "knowingly"
- FCA liability and damages issues reserved for jury

Halifax – Other MSJ motions denied

- Halifax's MSJ denied
  - Disputed issue of fact whether neurosurgeons paid consistently with FMV
  - In some years, compensation was twice the 90th percentile
  - Productivity figures touted as supporting the high compensation included bills submitted under their names for NP and PA work
  - "The propriety of the neurosurgeons' compensation under the Stark Act is a matter for the jury to decide
- Relator's MSJ denied under AKS employment safe harbor

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United States ex rel. Baklid-Kunz v. Halifax Medical Center (M.D. Fla.) (Cont'd)

Halifax

- March 2014 set for trial
  - Short-stay issues (summary judgment motion pending)
  - Damages and FCA liability on Stark Law/ oncologists issue issue
  - All issues on neurologists

Halifax settlement

- Potential $1.14 billion judgment
- More than $22 million in defense costs
- $85 million settlement plus extensive corporate integrity agreement
- Relator's claims for attorney's fee
- Settlement is more than eight times the hospital's operating margin and 18% of its $480 million annual revenue. Source: *Modern Healthcare*

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015)

- In 2005, Dr. Michael Drakeford, an orthopedic surgeon, sued Tuomey under the False Claims Act (FCA). The United States intervened in 2007.
- In 2010, the case went to trial in the U.S. District Court for the District of South Carolina.
  - The jury found that Tuomey violated the Stark Law but not the FCA.
  - The district court set aside the jury's verdict and ordered a new trial, but entered a $45 million judgment against Tuomey.
- In 2012, Tuomey appealed to the Fourth Circuit which vacated the monetary judgment and ordered a new trial.
- In 2013, the case was retried in district court and the jury found that Tuomey violated the Stark Law and FCA and awarded $237,454,195 to the U.S.
- Tuomey appealed for a second time and the Fourth Circuit affirmed the judgment against Tuomey on July 2, 2015.

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

- Tuomey Healthcare System was a nonprofit hospital in Sumter, South Carolina.
- Sumter is a federally-designated medically underserved area.
- Tuomey was concerned about doctors who previously performed outpatient surgery at the hospital now performing the surgeries at other off-site facilities.
- Tuomey sought to negotiate part-time employment contracts with physicians to perform outpatient surgeries at the hospital.
- Physician compensation exceeded FMV, not commercially reasonable and based on volume and value of referrals

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

- The terms of the physicians' contracts:
  - Physicians were to perform all outpatient surgeries at Tuomey for a 10 year term.
  - Upon termination, the contracts had a non-compete provision for 2 years within 30 miles of Tuomey.
- Physicians' compensation varied with the number of referrals made to Tuomey, implicating the Stark Law.
- Tuomey was found to have submitted 21,730 false claims.

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey

- GI and other specialists considering investing in ASC, moving procedures there
- In response, Tuomey proposed part-time employment contracts. Physicians would be employees while they performed outpatient procedures at Tuomey facilities.

Tuomey-Part-time employment terms

- Physician required to perform outpatient procedures at Tuomey
- Physician assigns professional fees to Tuomey and Tuomey would bill for professional services and facility fee

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey – Part-time employment terms (Cont'd)

- Compensation
  - Base salary
  - "Productivity bonus" equal to 80% of collection of fees for professional services for outpatient procedures
  - Performance bonus based on quality measure
  - Benefits
- Ten-year term and non-compete for contract term plus two years after expiration
- Outside counsel for hospital approved the compensation model, relying on consultant's opinion on FMV and commercial reasonableness
- Average pay for physicians would be 19% over professional fee collections, but opined that physicians' compensation was consistent with fair market value and reasonable

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey – Part-time employment terms (Cont'd)

- Tuomey CEO advised Board that although the employment agreements would cost the hospital $1-2MM each year, employing the physicians would save millions in the long run by preserving facility fees that would otherwise be lost
- Tuomey approaches many physicians for part-time employment
- 9/04 – Dr. Michael Drakeford (orthopedic surgeon) refuses
- Through 5/05 – Tuomey enters into part-time employment agreements with 19 specialists
- After Drakeford's lawyer persists with objections, Tuomey and Drakeford jointly retain Kevin McAnaney for a legal opinion

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Conference call with McAnaney

- Fair Market Value opinion from consultant is not enough
  - "it's just not common in my experience to hire physicians and pay them substantially above even their collections, much less their collections minus expenses."
  - "it would be very hard to sell" FMV
  - Expecting to pay more than collections would be a "red flag"
- Cannot justify losing money on part-time contracts by saying that they were "making it up on other business they were generating."
- Other hospitals have settled cases based on similar facts
- Context important – luring physicians from investing in an ASC

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Conference call with McAnaney (Cont'd.)

- Stringent non-compete and contrived part-time employment agreement are additional red flags
- "Government would find this to be an easy case to successfully prosecute."
- Doesn't pass the "red face" test
- Consultant powerpoints: "Government's Exhibit 1."

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey

- July 2005 – Dr. Drakeford sends letter to Tuomey Board chairman requesting meeting with Board
- In response, Tuomey Board adopts policy:
  - Requiring that anyone requesting to speak with the Board first present to the chairman and the CEO
  - That is shall be in the discretion of the chairman to decide if the full Board or any committees should hear the issue
  - Prohibiting any requester to have legal counsel present
- Drakeford's counsel asked McAnaney to put his opinion in writing, but Tuomey's counsel tells him not to
- August 2005- Tuomey retains another law firm that opins that the arrangements are legal, again deferring to consultant's FMV opinion
- Law firm's opinion did not consider whether compensation "took into account" the volume or value of referrals

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey

- October 2005- Drakeford files *qui tam*
- First trial – March 2010
  - Judge excluded evidence of McAnaney call
  - Verdict: Tuomey violated the Stark Law, but not liable under FCA
  - Judge entered judgment for approximately $44.9 million on Government's common law claims
- Fourth Circuit reversed because hospital entitled to jury determination of damages
- Forth Circuit held that "take into account" "value or volume of referrals" includes anticipated referrals

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey Retrial (May 2013)

- Jury verdict
  - $39.3 million in "single" damages and 21,730 false claims
  - Hospital liable under FCA
- Tuomey moved for retrial on grounds, inter alia, that: (1) the compensation did not take into account or vary with volume/value of referrals, (2) did not prove Hospital acted knowingly

Tuomey Motion for New Trial

Did physician contracts constitute an indirect financial relationship under Stark Law?

- An indirect compensation agreement exists if, inter alia, the referring physician receives aggregate compensation that "[1] varies with, or [2] takes into account, the volume or value of referrals or other business generated by the referring physician for the entity furnishing" services. 42 C.F.R. § 411.354(c)(2)(ii)

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey – "Vary with volume or value of referrals"

- Tuomey: Variable component of compensation was based solely on collections for personally performed services and not based on facility fees received by the hospital, so it did not vary with volume or value of referrals
- Government:
  - All the services provided under employment agreement consisted of performing procedures which necessarily involved referrals
  - "One-to-one relationship" between each physician's aggregate compensation and the physician's referrals of facility components to the hospital
  - Each time a physician performed a procedure on a Medicare patient at Tuomey pursuant to contract, the physician's compensation would increase

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey – Vary with volume or value of referrals

"the Government presented evidence of a one-to-one relationship between each doctor's aggregate compensation and the volume or value of each doctor's referrals of technical components to the hospital. The Government presented testimony wherein Tuomey acknowledged that each time one of the physicians performed a legitimate procedure on a Medicare patient at Tuomey's facility pursuant to his or her agreements, the physician's compensation would increase. In addition, the Government presented testimony that each time one of the physicians referred a patient to Tuomey's facility, Tuomey received a facility fee for the services that the hospital provided in connection with the referral.

… A reasonable jury could have found the physicians' compensation varied with [the] volume and value of the physicians' referrals to Tuomey." (10/2/13 opinion).

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

"Take into account" the volume or value of referrals

- Government's argument:
  - Cejka valued the non-compete provision based on anticipated lost facility fee revenue and used those figures as a "benchmark" in developing the compensation plans
  - Tuomey COO: "That salary is derived and defended by the analysis of the value of the work that the hospital may lose if the surgeons were to work elsewhere and the value of having them sign an exclusive arrangement with the hospital to do the work only at our place."
  - Hospital told surgeons that anesthesiologist and radiologists were not offered similar contracts because "y'all create the volume."
  - Hospital wanted to provide an economic incentive to physicians "who have been and continue to be loyal to Tuomey in terms of referrals"
  - Hospital wanted to "reward you economically" for using hospital facilities

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

"Take into account" the volume or value of referrals:

- "The court notes that the Government presented evidence from … witnesses tending to show that Tuomey took into account the volume or value of referrals … A reasonable jury could have found that Tuomey took into account the volume or value of referrals in establishing physicians' compensation…"

Tuomey – Proof of referrals

- Inclusion of physician as "admitting physician" or "operating physician" on UB claim form was evidence that physician made a referral under the Stark Law

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey – FCA "Knowledge"

- Jury could find that Tuomey acted "knowingly" in light of its reaction to the McAnaney conference call
- Jury's calculation of damages and number of false claims implies that it found that Tuomey acted "knowingly" beginning in September 2005 (when McAnaney's engagement was terminated)
- Court entered judgment of $237,454,195 in favor of Government (Oct. 2, 2013)
  - Treble damages (3 x $39,313,065)
  - Penalties of $5,500 x 21,730
- Tuomey has spent $18 million on defense costs and anticipates another $5 million (including CIA compliance)

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United States ex rel. Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (Cont'd)

Tuomey Settlement?

- Terminating CEO and COO and severing relationship with outside general counsel, were condition precedent to continued settlement negotiations
- Tuomey settles for approximately $70 million and is subsequently sold to another health system

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Other Cases and Settlements

- *U.S. ex rel Reilly v. North Broward Hospital District, et al* (S.D. Fla.)
- *U.S. ex rel Payne, et al v. Adventist Health System/Sunbelt, Inc., et al* (W.D. N.C.)
- *U.S. ex rel Barker v. Columbus Regional Healthcare* (M.D. Ga.)
- *U.S. ex rel Bisk, et al v. Westchester Medical Center, et al* (S.D. N.Y.)
- *U.S. ex rel Parikh, et al v. Citizens Medical Center, et al* (S.D. Tx.)
- *U.S. ex rel Singh v. Bradford Regional Medical Center* (W.D. Pa.)

And Many Others

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Advice of Counsel Defense

- Defendant fully disclosed all relevant facts before receiving advice
- Relied on advice and acted in strict accordance with the advice
- Defense not available for advice secured to facilitate a crime or fraud
- Waiver of privilege and disclosure of all facts relied on for advice
- Can be a risky and often futile defense
- The success or failure of the advice of counsel defense often requires consideration by a jury during trial with all the attendant uncertainties

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"Good Faith Defense"

- "Good Faith" can be inconsistent with intent or willingness necessary to establish criminal or civil liability
- "Good Faith" encompasses the belief or opinion honestly held, an absence of malice or ill will and no intention to take advantage of another
- Did defendant act with intent to defraud or with "good faith" to act in accordance with the law
- May also require waiver of privilege and may only be put forth at trial

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THE END

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