



# The Tuomey Case: Lessons Learned . . . and Lessons to Come?

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# Tuomey Healthcare System

- Anchored by Tuomey Regional Medical Center:  
301 total beds
- 150 physicians on medical staff;  
25 specialties represented
- Located in Sumter, South Carolina, a medically underserved and HPSA area, with a population of approximately 106,000 people living in the Sumter County Metropolitan Statistical Area
- Provides healthcare services to citizens in several surrounding counties

# What Led to This Case?

- Tuomey's response to competition from an ASC
- Need to retain specialists' outpatient procedures for continued financial performance
- Physician negotiations
- Dr. Drakeford

# The Tuomey Employment Contract

- Part-time employment covering only *outpatient procedures*
- Exclusive
- 10-year term (no cut), with a 3-year non-compete
- Base Salary (based upon previous year's collections or procedures)
- Productivity Bonus (80% of collections)
- Incentive Bonus (up to 7% of Productivity Bonus, depending on qualitative factors)

# The Tuomey Employment Contract

- Healthcare insurance
- Tuomey paid all malpractice premiums (including premiums covering the physicians for office services and inpatient procedures)
- CME reimbursement
- Cell phone reimbursement
- Periodical/journal reimbursement

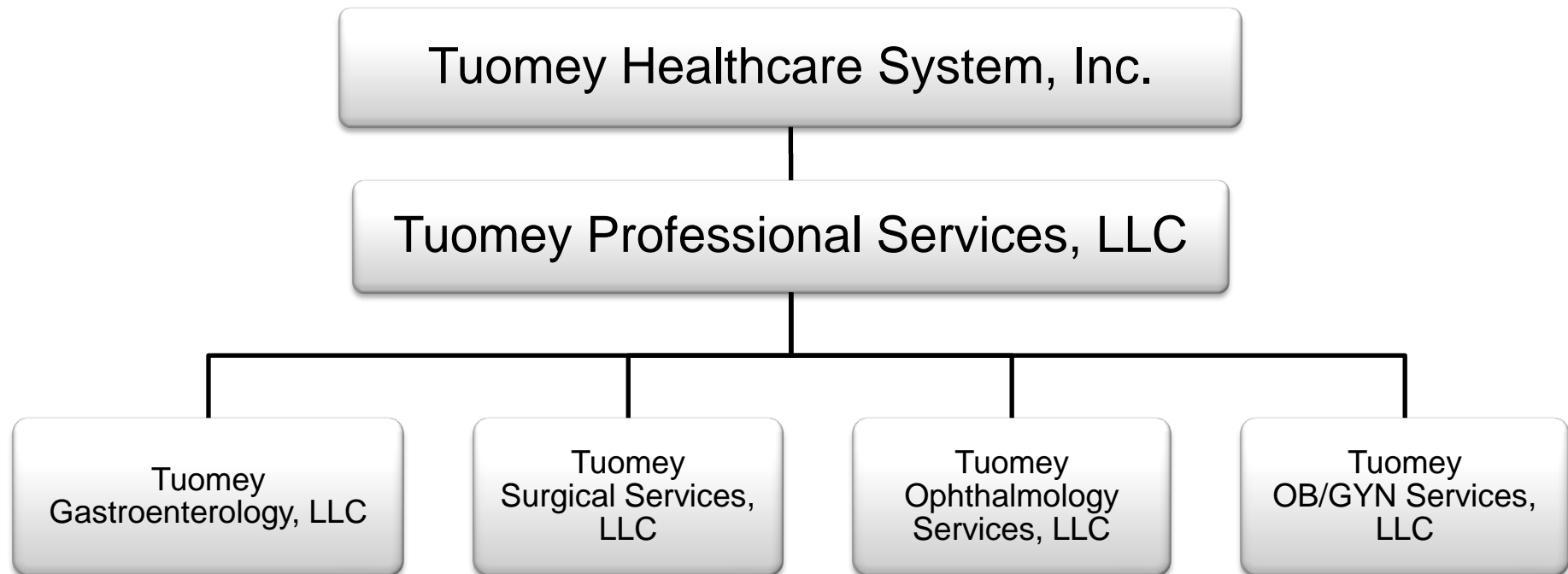
# Dr. Drakeford's *Qui Tam*

- *Qui tam* filed under seal in 2005.
- Government joined the action in 2007 by filing an amended complaint, claiming:
  - Tuomey violated the Stark law.
  - Tuomey violated the False Claims Act (“FCA”) by knowingly submitting claims for services performed by physicians whose contracts violated Stark.
  - Common-law claims: unjust enrichment, payment by mistake, accounting and disgorgement

# Alleged Stark Violation: The Government's View

- A financial relationship clearly existed between Tuomey and 19 physicians (the relationship was “indirect” due to unbroken chain of intervening LLCs).
- The compensation arrangement did not meet an applicable exception.

# Employment Structure





# Tuomey's Claimed Exceptions

- Indirect Compensation Arrangement Exception
  - Compensation is *fair market value* for services provided and *does not take into account the volume or value of referrals*.
  - Compensation arrangement set out in writing, signed by the Parties, and specifies the services covered, except for bona fide employment arrangements which must be for (1) *identifiable services*, and (2) *commercially reasonable*, even if no referrals are made.
  - The arrangement does not violate the Anti-Kickback Statute or any other billing/claims submission laws.

# Tuomey's Claimed Exceptions (cont.)

- Bona fide employment exception
  - Employment is for ***identifiable services***.
  - Compensation is ***fair market value*** and does not ***take into account the volume or value of referrals***.
  - Compensation is ***commercially reasonable***, even if no referrals are made.
- Although exception is applicable to direct compensation arrangements, Tuomey argued that if it proved the bona fide employment exception, then the contracts were, by definition, not a “compensation arrangement”.  
(42 U.S.C. § 1395nn(e))

# Alleged FCA Violation

- Because Tuomey’s compensation arrangements violated Stark, all claims for reimbursement submitted to Medicare were “objectively false”.
- Thus, the Government argued that
  - Tuomey presented to Medicare objectively false claims (submitted in violation of Stark); and
  - Tuomey knew that the claims were false.

# Claimed Damages

- \$44.8 million worth of false claims
- Trebled (approximately \$134.4 million)
- Plus \$5,000–\$10,000 per claim in civil penalties, applicable to nearly 26,000 individual claims for reimbursement
- Common law claims

# The Government's Characterization of the Case

## Opening Statement

- “The government contends that this cases [sic] is about a hospital, Tuomey Hospital, that was so afraid of the competition that it was facing for the first time, that it was willing to do just about anything, including breaking the law, to get ride of that competition.”

Trial Tr. p. 20, lines 3-7

# The Government's Characterization of the Case (con.t)

## Closing Argument

- “The Stark law was passed to prevent the corrupting influence of money on medical decision making. The money in this case is what it’s all about.”

Trial Tr. p. 1967, lines 17-19

# The Government's "Red Flag"

- Much of the Government's case focused on what "red flags" Tuomey received. The Government contended that these red flags established the knowledge element of the FCA claim. The government presented evidence of knowledge in two ways:
  - Testimony from Tuomey's "advisors" (but not its own lawyers)
  - Tape-recorded board meetings

# Tuomey's “Advisors”

- Dick Kusserow, former DHHS IG, retained to evaluate the contracts
- Greg Smith, attorney for Dr. Drakeford during negotiations (McAnaney kept out)
- Kim Saccone, “Senior Consultant” in the Cejka Consulting firm



# Tape Recordings

- Tuomey taped numerous Board meetings.
- Comments on tapes were used against Tuomey.
- Government contended Tuomey may have misled the doctors.
- Government contended Tuomey Board may have been wrongfully assured of compliance.

# The Government's Technical Argument

- Kathleen McNamara testified as the Government's expert.
- She contended that all of the physicians' compensation exceeded fair market value, some in cash alone, and others in benefits.
- She explained the RVU compensation methodology to the jury.

# McNamara's Red-Flags

- 10-year term was atypical.
- Part-time, partial services, contracts were unusual.
- Tuomey's total exclusivity was unusual.
- Tuomey's compensation formula was flawed.
- Full-time benefits to part-time employees was inconsistent with Tuomey's normal policies (evidence of commercial unreasonableness).

## McNamara's Red-Flags (cont.)

- Tuomey doctors were paid more than physicians in Manhattan, Chicago, and other high-cost areas.
- Productivity bonus and incentive bonus kick in with first dollar earned; ties compensation to the volume and value of referrals.
- Doctors did nothing to earn base salary (*i.e.*, very few new administrative duties; no “identifiable services”).

# Tuomey's Defense

- Streamlined defense
- Two witnesses: (1) Doug Cardinal of Cejka and (2) Steve Rice, Tuomey's expert
- No attorneys testified; Tuomey relied upon the tape recordings played by the Government to establish its reliance on the advice of counsel defense.

# Tuomey's FCA Defense

- What false claims?
  - Patients got care.
  - Medicare got what it paid for.
  - No claim of overbilling
  - No claim of unnecessary services or upcoding

# FMV Issues

- Three experts were involved:
  - Cejka (on behalf of Tuomey at the inception of the contracts)
  - Steve Rice with Integrated Healthcare Strategies (Tuomey's expert)
  - Kathleen McNamara with Myers and Stauffer LC (the Government's expert)

# In this corner, weighing 225 lbs...

- Perhaps the first Stark/FCA allegation involving a battle of valuation experts
  - A valuation firm opined favorably on the subject transactions (at or near their inception).
  - An expert for the Government opined that the agreements were categorically above FMV.
  - An expert for the defendant opined that the subject agreements were categorically consistent with FMV.



# The Cejka Report

- Cejka is now defunct as a valuation firm.
- In hindsight, the Cejka reports left much to be desired.
- The valuation reports are approximately 3 ½ pages in length.
- Cejka states “Higher total compensation is justified for higher levels of productivity.” However, the analysis indicates that the physician’s productivity fell between the 50th and 75th percentiles, yet compensation was above the 90th percentile.

# The Cejka Report (cont.)

- A table within the report indicates that *net collections and total cash compensation* are nearly identical.
- No mention was made regarding “fulltime” benefits for part-time employees.
- In its conclusion: “Cejka recognizes that this is an aggressive compensation plan that should be reviewed by a third party periodically to ensure that the terms continue to provide total compensation that is within fair market value.”

# The Government's Expert

- Concluded that the physicians were paid in excess of FMV, the benefits exceeded FMV and the terms of the agreements were not commercially reasonable.
- States “Physician compensation at the median level is the accepted FMV level.”

# Tuomey's Expert

- Concluded that the contracts were commercially reasonable and consistent with FMV
- Embodied a more qualitative approach and analysis
- Numerous individuals were interviewed.
- Cited difficulty in recruiting physicians
- Cited opportunity to save the armed forces *millions of dollars*

# Tuomey's Expert (cont.)

- Tuomey's expert indicated "there are some terms that are included in these agreements that we do not generally observe," including:
  - 10-year contract term
  - Employing physicians on a part-time basis for only their outpatient surgical services
  - Provision of full-time benefits for part-time employees
  - A compensation arrangement that provides base and incentive compensation without required productivity prior to payment of incentives

# The Verdict

- The jury found
  - Tuomey violated the Stark law (but Tuomey claims verdict based on erroneous instructions).
  - Tuomey did not violate the FCA (but Government claims relevant testimony erroneously excluded).

## Post Trial

- On June 3, 2010, the Court granted the Government's motion for JMOL on its common law claims.
- The Court ordered Tuomey to pay \$44.8 million, plus interest.
- The Court also ordered a new trial on the Government's False Claims Act cause of action.
- Practically, the parties may have to re-litigate the entire case.
- Tuomey has appealed to the Fourth Circuit.

# **THE GOVERNMENT'S POSITIONS ON PHYSICIAN CONTRACTING**



# The Government's Position # 1

- “Opinion shopping” undermines the reliance on the advice of counsel defense.
  - Tuomey disregarded adverse legal and expert opinions.
  - Tuomey, after seeking counsel from Mr. McAnaney, ignored his opinion.
  - Tuomey officers mischaracterized opinions in conversations with the Board.
  - If you assert the defense, be prepared to open your lawyers' files.

# The Government's Position # 1 (cont.)

- Cursory disclaimers and caveats will not provide a lawyer with protection.
  - Lawyers must resist the temptation to “work backwards” in rationalizing a client’s desired result.
  - Government asserted that if you employ a “creative” or “unusual” proposed arrangement, get an OIG opinion.
- >>>> **Question:** Is there ever a way to assert advice of counsel effectively? Is there a meaningful difference between an “assessment” and an “opinion” if the case is litigated?

# The Government's Position # 2

- Beware of creating “after-the-fact artifacts”.
  - Clients should be careful to retain recordings only for so long as they are necessary.
  - Sensitive meeting minutes should be reviewed and approved by counsel.
- >>>> **Question:** But can this taint counsel's ability to opine?  
Make counsel a co-conspirator?

# The Government's Position # 3

- Expert analyses are only as credible as the people who prepare them.
    - The consultants must be able to defend their conclusions.
    - “Commercial reasonableness” analysis must be thorough and complete.
- >>>> **Question:** What involvement should counsel have?

# The Government's Position # 4

- Develop compensation arrangements with care.
  - Should have a built-in “legality review” every few years or a shorter term
  - Should include significant administrative duties if part of the compensation is in exchange for performing those administrative duties
  - Productivity bonuses should not “kick in with the first dollar earned”.

# The Government's Position # 4 (cont.)

- Compensation per RVU should not exceed the 75th MGMA percentile without substantial justification.
- Benefits afforded physicians should be consistent with the benefits provided to other hospital employees.
- Compensation calculation methodology may matter to the Government more than the actual amount of money paid to a physician.
- No “backing into” a fair market value and commercial reasonableness analysis.

# The Government's Position # 4 (cont.)

- Paying for “loyalty” is not defensible.
  - Be wary of arrangements where it is mathematically impossible for the provider to make money or break even.
    - Recognition that some specialties may never be profitable (e.g., emergency room physicians)
    - Across-the-board losses on all specialties will be seen as suspect.
- >>>> **Question:** Under what authority does the Government get into the nuts and bolts of compensation decisions? Is there a way to challenge Government's positions?  
What different facts would help?

# The Government's Position # 5

- CMS commentary

- Excluded from jury charge
- Government stated that the regulations and the statute were “clear”.

>>>> **Question:** So, can we throw out all those preambles and comment responses now?  
Can there be any reliance on sub-regulatory statements?



# FMV Lessons

- An independent FMV opinion should serve as a significant safeguard to the parties in establishing compliant compensation arrangements, BUT...
- Few, if any, standards exist for compensation valuation engagements or valuation firms. Independent valuation firms can each analyze the same data, and arrive at opposing conclusions (as in the present case).
- FMV reports should be read and critiqued (but by who?). Be sure to bring your magnifying glass. (See next slide.)
- Even for the reasonably well educated reader, it can be difficult to follow valuator's data, logic and conclusions. In light of the brevity of the Cejka report, it is fairly easy to read and react to. The litigation experts' reports (and many other FMV reports) require significantly more time and attention.

W-Tecny Corp  
 County of Lucas - General Services  
 PAYROLL

Fiscal Year	Type	Total WFTL	Total WFTL	WFTL	WFTL		WFTL		Collection	Gross Collections		Net Collections		Fees	Productive	Inventive	Political/Col.	Total	Administrative	Other	Professional	Total Gross	Total Benefits																						
					2015 Rate	2016 Rate	Commodity to 2015 Rate	Commodity to 2016 Rate		Rate 2015	Rate 2016	Comp. B	Comp. B																																
2015			0.00	90900	\$	43.65	\$	62.87	\$	-	\$	54.25	61.05	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-																				
2016			0.00	90900	\$	44.41	\$	51.48	\$	-	\$	52.25	61.25	\$	1.00	\$	1.94	\$	1.00	\$	2.94	\$	2.94	\$	32.07																				
2017		2,150.00	3,300.00	7,650.00	3%	\$	45.67	\$	57.29	\$	90,361	\$	123,869	\$	105,669	\$	59,595	\$	65,346	\$	8,837	\$	64,532	\$	4,440	\$	38,673	\$	39,804	\$	11,906	\$	1,907	\$	63	\$	1,624	\$	18,257	\$	62,695				
2018		2,863.00	3,280.00	8,543.00	3%	\$	45.42	\$	55.72	\$	106,406	\$	147,734	\$	79,617	\$	54,26	\$	64,6%	\$	42,529	\$	57,671	\$	71,036	\$	126,085	\$	-	\$	136,965	\$	62,716	\$	11,902	\$	-	\$	376	\$	1,140	\$	21,587	\$	76,322

Weighted Average % of Tenney WFTL is 32.1%

2018 WFTL available

Collection available	Summary of 2015		Summary of 2016		Summary of 2017		Summary of 2018			
	Rate	Rate	Rate	Rate	Rate	Rate	Rate	Rate		
FBI Comp Range based on WFTL	\$ -	\$ -	\$ -	\$ -	\$ 101,351	\$ 123,869	\$ 105,406	\$ 147,734		
FBI Comp Range based on % of Collection	\$ -	\$ -	\$ 88	\$ 1,144	\$ 56,620	\$ 63,216	\$ 42,628	\$ 51,671		
W-2 Reported Wages			\$ 1,258		\$ 69,967		\$ 69,967			
Calculated Paid Comp	\$ -		\$ 2,693		\$ 68,619		\$ 136,656			
W-2 Comp and Benefits			\$ 101,655		\$ 101,655		\$ 101,655			
Calculated Comp and benefits	\$ -		\$ 35,937		\$ 69,267		\$ 212,367			
W-2 is used to approximate total as percentage of Total WFTL										
Productive Gross comp			\$ -		\$ 2,693		\$ 23,671		\$ (11,645)	
Administrative above							\$ 65,264		\$ 42,657	
Health and Dental above							\$ 6,659		\$ 7,681	
Political/Comp Other Pmts above							\$ 1,238		\$ 1,147	
Total Benefits Paid or Constructively Receivable					\$ 32,697	\$ -	\$ -	\$ 65,651	\$ -	\$ 61,173

\* Productive Gross is 83% of Collection  
 \* Productive Gross is 86% reported for 2017  
 \* Productive Gross is 76% for 2018

Fiscal Year	Type	Total WFTL	Total WFTL	Total WFTL	Total WFTL	Total WFTL	Total WFTL	Total WFTL	
2015		0.00							
2016		0.00							
2017		3,300.00	\$ 25,020.00	\$	0.76	\$	45.66	\$	11,902.00
2018		3,280.00	\$	-	\$	0.33			

Fiscal Year	Type	Total WFTL	Total WFTL	Total WFTL
2015		\$ -	\$ -	
2016		\$ 1,258	\$ 13,644.70	7.1%
2017		\$ 69,967	\$ 68,619.00	92.2%
2018		\$ 68,619	\$ -	

## FMV Lessons (cont.)

- The sophistication of valuation approaches and reports has stepped up significantly over time.
- There are valuers of various capabilities, and certain firms may come and go. All the more reason to insure that the report in hand appears defensible.
- Only recently has it come to general light that *median compensation per wRVU* provides a reasonable indication of FMV at all productivity levels. Previously, it might have been logical to assume that a physician producing at the 90th percentile of wRVUs could be paid at the 90th percentile *compensation per wRVU*.

## FMV Lessons (cont.)

- The valuation of employment agreements presents particular challenges since they are multi-dimensional. Frequently, the valuator is asked to evaluate a specific proposed compensation package (with many moving parts).
- Compensation agreements can be very complex. Be cautious if an arrangement can't be explained in a few simple sentences.
- The outcomes of compensation arrangements can be materially unpredictable, and effort should be made to model resulting *total compensation* under the spectrum of various scenarios.

## **FMV Lessons (cont.)**

- While “stacking” is a common sense concern, much more attention has been placed on this risk recently.
- The use of multiple compensation surveys (for multiple years) is advisable. However, dealing with discrepancies among the surveys can present a challenge. Physician compensation surveys are highly useful, but they contain anomalies.
- The use of “national” vs. “regional” data in the salary surveys continues to be a challenge. While regional data may seem more relevant, it can suffer significantly by virtue of smaller sample sizes.

## **FMV Lessons (cont.)**

- Valuator independence vs. involvement in agreement structure
- Counsel guidance to valuers
- Is it OK to evaluate downstream referrals?

# WHAT'S NEXT?

**QUESTIONS?**