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Fourth Circuit Rejects 'Advice of Counsel' Defense

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A major new decision from the U.S. Court of Appeals for the Fourth Circuit has important implications for the availability of the "reliance of counsel" defense, particularly in situations involving the application of complex statutes and regulations.

In *U.S. ex rel. Drakeford v. Tuomey*, the Fourth Circuit affirmed the District Court's prior judgment of over $237 million in damages and penalties against a South Carolina nonprofit, tax-exempt health care system. The judgment was based upon a jury finding that the Tuomey Healthcare System had submitted over 21,000 false claims to Medicare pursuant to part-time physician employment contracts, which the jury determined had been submitted in violation of both the federal False Claims Act (FCA) and the federal Stark anti-self referral law.

While the Court of Appeals ruled on a number of issues presented by Tuomey on appeal, noteworthy was its rejection of Tuomey's advice of counsel defense. In particular, the Court of Appeals found that, in failing to provide outside counsel all relevant factual information (including not only the facts of the arrangement but also the views of other counsel), Tuomey had not met the basic legal requirements necessary to sustain an advice of counsel defense. The Court went further to suggest that Tuomey's advice of counsel defense was additionally undermined by the appearance of "opinion shopping." This ruling has implications beyond health care, to other industry sectors in which clients frequently seek multiple legal opinions to help them address technical legal issues.

The advice of counsel issue arose from concerns with respect to the legality of the part-time employment agreements which Tuomey proposed to local physicians. Unlike situations in which a defendant has arguably not paid sufficient attention to the process of obtaining independent legal advice before entering into a risky arrangement, Tuomey's management actually applied substantial effort to the Stark Law compliance question at hand. Tuomey had received an opinion from its longtime general counsel, who generally approved of the employment contracts.

Tuomey and a concerned physician (Drakeford, who ultimately was the *qui tam* whistleblower who filed the case against Tuomey) subsequently jointly solicited an additional opinion from a another attorney (who had formerly served as the Chief of the Industry Guidance Branch of the Office of Inspector General of the U.S. Department of Health and Human Services). That attorney advised Tuomey that the proposed employment contracts would raise "red flags" and would be "an easy case to prosecute" for the government. Tuomey's management, in the Court of Appeals' view, gave this opinion insufficient internal consideration. The lawyer was directed by Tuomey,

consistent with the initial engagement letter, not to put his advice in writing, and his engagement was terminated by Tuomey. Tuomey then received a subsequent favorable opinion from counsel with a national health law firm. Drakeford then filed his *qui tam* alleging Tuomey's FCA and Stark Law violations.

Under the FCA, the plaintiff must establish, among other elements, that the defendant acted knowingly in submitting false claims to the government. A district court in the Fourth Circuit has observed that the allegation of knowingly submitting a false claim may be contradicted by evidence that the defendant relied on the advice of counsel under the relevant criteria required. In order to assert this defense, however, Tuomey was obligated to waive the attorney-client privilege on all of the relevant communications. This waiver made available for outside scrutiny the full array of legal advice and communications in which Tuomey and its various in-house and outside counsel engaged.

In its appeal of the initial jury verdict, Tuomey argued that no reasonable jury could have concluded that it knowingly violated the FCA, because it had reasonably relied on the counsel's advice that the proposed arrangement was in compliance with the Stark Law. This argument was rejected by the Fourth Circuit, which concluded that given Tuomey's failure to provide to all of its outside counsel all of the relevant information about the proposed part-time arrangement and Tuomey's failure to adequately consider the warnings of the jointly retained outside counsel, a reasonable jury could find that the advice of counsel defense was not applicable to Tuomey's defense.

The Fourth Circuit's opinion saw the record as ". . . replete with evidence indicating that Tuomey shopped for legal opinions approving of the employment contracts, while ignoring negative assessments." The Court of Appeals noted, for example, that Tuomey did not tell subsequent outside counsel about the jointly retained counsel's unfavorable Stark Law analysis of the proposed arrangement.

Some may regard *Tuomey* as a classic example of "bad facts make bad law." Nevertheless, the *Tuomey* decision unavoidably casts a cloud of uncertainty over otherwise legitimate efforts by organizations to seek advice on a difficult issue from several different law firms. How many legal opinions can be solicited in the due diligence process before regulatory enforcers or courts concluded that an organization is "opinion shopping"? What are the consequences for the organization's attorney-client privilege protections when the advice of counsel defense is being considered? In situations where multiple opinions may be useful to an organization, how does leadership structure its review and consideration of those multiple positions toward the goal of reaching an informed decision? Was the court suggesting that an organization must conduct some form of competency/experience analysis in evaluating the positions taken by its different attorneys? How best to demonstrate for the record leadership's good faith when presented with conflicting opinions?

From a broader perspective, the Fourth Circuit's opinion serves as a cautionary note on the limitations of the advice of counsel defense; i.e., that this defense should not be taken for granted by either management or the board. Clearly, leadership can't use the defense when it is aware of circumstances that would make that reliance unjustifiable. This is particularly the case in a regulatory environment in which individual, as well as organizational, accountability is increasingly "the order of the day."

Corporate counsel may thus use the *Tuomey* decision as a platform from which to engage leadership in a discussion concerning the elements of the defense, and the steps that should be taken to secure its availability. Creating an "Advice of Counsel Reliance Checklist" would position leadership to resolve critical questions such as the expertise and independence/lack of conflicts of the outside legal counsel; the scope of its engagement; whether counsel was provided with all relevant facts; the extent of its opinion—and any related caveats or "hedges" regarding the risks as may be identified by the opinion. It also can help form the basis for a governing board to rely on the protections of the business judgment rule.

The ability to rely on the advice of counsel can be a crucial element of an organization's defense to legal challenge to a particular action or nonaction. The Fourth Circuit's decision in *Tuomey* provides an important reminder that the reliance on counsel defense is not always a slam dunk.

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