

HEALTH INDUSTRY ALERT

COURT AWARDS MEDICAL PRACTICE MORE THAN \$500,000 BASED UPON THE GOVERNMENT'S IMPROPER USE OF THE FALSE CLAIMS ACT



In the final act of proceedings the government first initiated in the early 1990s, a district court ruled that a False Claims Act (FCA) action against a Las Vegas physician's medical practice lacked "substantial justification," thereby qualifying the medical practice to have its attorneys' fees recovered under the Equal Access to Justice Act (EAJA).

EAJA ACTION

As noted in a previous Client Alert ("Winning a False Claims Act Case against the Government," December 18, 2006, <http://www.akingump.com/files/upload/Dr.%20P%20Client%20Alert.pdf>), the physician had been the target of federal investigators who tapped his phones, wired witnesses to record his conversations and subpoenaed patient and billing records. The case went before a grand jury in 1992, and the government intervened in an FCA action the following year, but withdrew from the suit two years later.

In 2004, the government renewed its attack with its own FCA suit, alleging false claims for pulmonary stress tests. Specifically, the government contended that, from 1998 to 2004, the physician and his medical practice had submitted fraudulent Medicare bills because Medicare did not cover simple stress tests performed as part of a pulmonary rehabilitation program, the tests were not medically necessary, and the physician failed to provide supporting documentation for the billing. Because the FCA permits the government to obtain treble damages and substantial civil penalties of between \$5,500 and \$11,000 per claim, the government claimed that it was entitled to obtain \$22 million if it prevailed in the lawsuit.

In 2006, after the completion of discovery, the physician and his medical practice moved for summary judgment. The court ruled in their favor, noting that the government's claim that the physician and his medical practice had *knowingly* submitted false claims was "not even close." See *United States v. R.D. Prabhu*, 442 F. Supp. 2d 1008 (D. Nev. 2006).

Immediately after the court ruled, the medical practice moved to recover its attorney fees under EAJA. Specifically, it pointed out that the United States' position was not substantially justified because it had presented to the government precisely the same facts, evidence, and case law authority that resulted in the dismissal of the government's action immediately before and after the action was filed and because the government refused to withdraw allegations that *any* pre-suit investigation would have revealed were clearly erroneous. The medical practice also pointed out that it was entitled to recover the full share of attorneys' fees it expended (not subject to the EAJA cap of \$125 per hour) because the specialized skill and expertise of Akin Gump Strauss Hauer & Feld LLP's Robert Salcido was needed to achieve a successful result.

The district court ruled that the medical practice was entitled to recover attorneys' fees under EAJA, awarding the medical practice \$542,494. See *United States v. R.D. Prabhu, M.D., and R.D. Prabhu-Lata Shete, M.D. 's, Ltd.*, 2:04-cv-00589-RCJ-LRL (<http://www.akingump.com/files/upload/EAJA%20Order%20II.pdf>). Although the court ruled that "Medicare fraud law represents a potential area of expertise" and that Akin Gump's Robert Salcido possessed such expertise based upon his prior experience as a Department of Justice FCA lawyer, the publication of his books on the FCA, and the fact that even the government's expert witness conceded that he possesses specialized skill, the court did not award the full market share of those fees, because it found that it was not clear that no suitable counsel could be found to defend the case at the EAJA statutory rate (\$125 per hour).

LESSONS LEARNED

In this FCA action, the medical practice was able to transform a governmental FCA claim of more than \$22 million into a \$542,494 judgment against the government. One lesson of the case is that it is useful to present to the government at the very start of the proceeding a thorough analysis regarding why precisely the government's allegations lack merit. If the defendant is qualified to obtain a recovery under EAJA, that same evidence can then be provided to a court to demonstrate that the government either knew or should have known that its action, from the start, lacked substantial justification and thereby significantly increase the likelihood the defendant will prevail under EAJA.

UPCOMING SPEAKING ENGAGEMENTS AND OTHER FCA NEWS

On August 11, 2008, Robert Salcido will be a speaker at the ABA Annual Meeting, Section of Public Contract Law in New York City entitled **“Moving Fast: Up-to-the-Minute Developments in the False Claims Act and Nimble Negotiation of Subcontractors under Federal Services Contracts.”** Robert will be discussing the Supreme Court’s recent decision in *Allison Engine Co. v. United States ex rel. Sanders Inc.*, No. 07-214, 2008 U.S.LEXIS 4704 (June 9, 2008), and how that decision will impact the application of the False Claims Act in cases alleging Medicare or Medicaid fraud. For more information, visit <https://reg.itsmeetings.com/Its/0808abany/choices.asp>

On October 6 and 7, 2008, Robert Salcido will be a speaker at the American Health Lawyers Association Fraud and Compliance Forum in Baltimore, Maryland. The theme of his discussion will be: **“How to Defeat the Government’s Claims that the Provider’s Services Lack Medical Necessity.”** For more information, visit http://www.healthlawyers.org/Template.cfm?Section=Program_Calendar&CONTENTID=56102&TEMPLATE=/ContentManagement/ContentDisplay.cfm

On November 18, 2008, Robert Salcido will be a speaker at the American Conference Institute 8th National Conference on **“Reducing Legal Risks in the Sale and Marketing of Medical Devices.”** Robert will be discussing limitations imposed upon sales staff in offering remuneration to physicians and other referral sources. For more information, visit http://www.americanconference.com/regulatory_compliance/MedicalDevices.htm?PageMode=Search

AHLA PUBLISHES THE SECOND EDITION OF FALSE CLAIMS ACT AND THE HEALTHCARE INDUSTRY

The American Health Lawyers Association has published the second edition of Robert Salcido’s treatise *False Claims Act and the Healthcare Industry*. The book analyzes several hundred FCA cases, including all FCA cases that address potential violations of the Stark law or the Anti-Kickback Act. The new edition also covers the latest FCA developments, so that you can more effectively evaluate a company’s potential exposure to liability, and reform company practices to reduce the risk of potential FCA liability.

For more information on this book please go to: <http://www.lexisnexis.com/ahla/ProductDetail.aspx?id=991>

CONTACT INFORMATION

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