

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

UNITED STATES OF AMERICA	)	
ex rel. RONDA OSINEK,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	<b>NO. C 13-03891 EMC</b>
	)	
KAISER PERMANENTE, et al.,	)	
	)	
Defendants.	)	
_____	)	

San Francisco, California  
Thursday, April 21, 2022

**TRANSCRIPT OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS**

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1 Thursday - April 21, 2022

1:31 p.m.

2 P R O C E E D I N G S

3 ---o0o---

4 **THE CLERK:** These proceedings are being recorded by  
5 this court. Any other recording of this proceeding, either by  
6 audio, video, including screenshot or other copying of the  
7 hearing, is strictly prohibited.

8 This court is now in session. The Honorable Edward  
9 M. Chen presiding.

10 The Court is calling the case Osinek, et al. versus Kaiser  
11 Permanente, Case Number 13-3891.

12 Counsel, please state your appearances for the record,  
13 beginning with the plaintiffs.

14 **MR. HANAGAMI:** William Hanagami for plaintiffs and  
15 relators Stein and Bone.

16 **THE COURT:** All right. Thank you, Mr. Hanagami.

17 **MR. VOLDMAN:** Max Voldman for plaintiff/relator  
18 James Taylor.

19 **THE COURT:** All right. Thank you, Mr. Voldman.

20 **MR. LEWIS:** Roger Lewis for plaintiff/relators Bryant and  
21 Hernandez.

22 **THE COURT:** All right. Thank you, Mr. Lewis.

23 **MS. ZEMAN:** Amy Zeman on behalf of relator Osinek.

24 **THE COURT:** All right. Thank you, Ms. Zeman.

25 **MS. QUINN:** Janel Quinn on behalf of plaintiff/relator

1 Michael Bicocca.

2 **THE COURT:** All right. Thank you, Ms. Quinn.

3 Does that cover all the relators? Anybody else?

4 All right. Then for the defense.

5 **MR. BLALACK:** Good afternoon, Your Honor. Lee Blalack on  
6 behalf of the defendants, and I have one colleague, my partner  
7 David Leviss here.

8 Dave?

9 **MR. LEVISS:** Good afternoon, Your Honor. David Leviss  
10 also on behalf of the defendants.

11 **THE COURT:** All right. Thank you.

12 Is the Government attending?

13 **MR. DYAL:** Yes. This is Gary Dyal on behalf of the  
14 Department of Justice.

15 **THE COURT:** All right. Thank you, Mr. Dyal.

16 I thought I saw a hand raised. Was there another hand  
17 raised? Someone else want to be admitted? Abram Zinberg?

18 We can't hear you, Mr. Choe.

19 **MR. ZINBERG:** Okay.

20 **THE COURT:** Is that Mr. Zinberg?

21 **MR. ZINBERG:** I'm trying. There we go.

22 **THE COURT:** All right. Do you want to make your  
23 appearance, Mr. Zinberg?

24 **MR. ZINBERG:** Yes. Abram Zinberg on behalf of relators  
25 Stein and Bone.

1           **THE COURT:** Okay. And, Mr. Choe?

2           Well, we cannot hear you, unfortunately.

3           **MR. CHOE:** Apologies, Your Honor. Can you hear me now?

4           **THE COURT:** Yeah, we can hear you now.

5           **MR. CHOE:** Yes. Shiwon Choe on behalf of the  
6 United States.

7           **THE COURT:** All right. Thank you.

8           All right. We're here to examine the defendants' motion  
9 to dismiss based on the first-to-file bar of the FCA, which  
10 bars related actions, quote/unquote, based on facts underlying  
11 the pending action.

12           And so as I understand it, the exercise requires us to  
13 examine the first-filed complaint, which is the Osinek case,  
14 against subsequent complaints. But the subsequent actions are  
15 also measured against the preceding actions. So if, for  
16 instance, I find that Osinek and Taylor are not so related that  
17 some aspects of Taylor survive, the next series of cases,  
18 including Stein, Bryant, and Bicocca, are subject to "first to  
19 file" based on any preceding case.

20           It seems to me there's an obvious logic to that because  
21 the whole idea is we don't want multiple cases on the same  
22 subject. So, sort of, the later you are in the chain, the more  
23 of a challenge it is because you've got a bigger base to try to  
24 measure up against in order to escape.

25           But the first order of business, I think, is to look at

1 the first two filed cases. And Taylor's is the first filed, at  
2 least in Colorado, and then being transferred here.

3 And so the first sort of legal question is: Do we look at  
4 the original complaint of the later filed or the amended  
5 complaint? And although there's some division in the cases,  
6 for reasons that have been stated by, I think, the majority  
7 rule, it seems to me that you look at the original complaint  
8 because, generally, that's how you measure jurisdiction as it  
9 existed when the action was filed. And there are a number of  
10 policy reasons supporting that as well. And so I am going to  
11 proceed by looking at the original complaints of the subsequent  
12 filers.

13 I think the bigger question is: How do we measure the  
14 similarity, the related action, the relatedness? Do we use the  
15 identical-facts test or the material-facts test? And if it's  
16 the material-facts test, how do you apply -- what does that  
17 really mean?

18 I think it's clear in this circuit that the Court does not  
19 apply -- the Ninth Circuit does not apply the identical-facts  
20 case; it applies the material-facts case. And it seems,  
21 though, that what the Courts have suggested is that you look  
22 to -- one aspect of applying the material-facts case is  
23 whether, quote, the first-filed claim provides the Government  
24 notice of the essential facts of an alleged fraud.

25 The D.C. circuit in the *Ex Rel. Batiste* case adopted a

1 similar approach. And *Hartpence* also talked about sort of the  
2 likelihood of the Government, being ultimately the party in  
3 interest here, having enough notice such that its notice of  
4 first case would have led to its decision, investigation into  
5 other claims.

6 So it seems to me that's the yardstick. I'll stop right  
7 there and see if others have any comment upon that theoretical  
8 framework, if anybody disagrees with that.

9 **MR. BLALACK:** Your Honor, this is Lee Blalack for the  
10 defendants. My partner David Leviss will be handling the  
11 argument today for the defendants; so I'll direct your question  
12 to him.

13 I think our answer is, we generally agree with that  
14 framework, but he can share our position.

15 **THE COURT:** All right. Mr. Leviss?

16 **MR. LEVISS:** In fact, we do, Your Honor, generally agree  
17 with the framework.

18 There was one, I guess, scope point that I wanted to  
19 clarify at the outset because the case law also makes clear  
20 that "first to file" is measured by a pending complaint at the  
21 time a later-filed complaint is filed. So even in the case of  
22 the Arefi complaint, which has not contested our motion and  
23 will be dismissed, Arefi could still have preclusive  
24 first-to-file effect on the later-filed complaints because it  
25 was pending at the time they were filed.

1           **THE COURT:** Right, right. And that's consistent with my  
2 view, is you look at all pending cases at the time it was  
3 filed. Unfortunately, if you're at the back of the line,  
4 you've got two, three, four, five hurdles to jump over, not  
5 just one, which, logically, I think that's the point of this.

6           In the end, I don't know if that's going to make much  
7 difference because, as we'll talk, we'll see what ground is  
8 covered by the first two, maybe three.

9           **MR. LEVISS:** Okay. Thank you, Your Honor.

10          **THE COURT:** Well, let's talk about the -- oh, Ms. Quinn,  
11 you had a -- you were going to --

12          **MS. QUINN:** Well, Your Honor, and I don't know if now is  
13 appropriate; or if we're kind of just going to go down the  
14 line, then I can certainly wait my turn.

15          But in terms of the framework that you've laid out on  
16 behalf of relator Bicocca, I think that we do take issue with  
17 looking at the original complaint, and we believe that would be  
18 the appropriate amended or pending complaint at the time that  
19 would be the operative pleading to look at.

20          I'm happy to discuss that more now, or like I said, if  
21 we're going down the line, we can address it later as well.

22          **THE COURT:** Well, let me ask you. Let me make sure I  
23 understand your point.

24          I agree that if the earlier complaints had been amended by  
25 the time the one you're comparing to is filed, you look at

1 whatever was existing at that time.

2 When I said you look at the original complaint, I'm saying  
3 the subsequent action, the second action or third -- whatever  
4 it is -- the subsequent action by which you're measuring the  
5 preceding actions, you would look at the complaint in that  
6 action and not further amendments to the subsequent actions as  
7 the comparator, as the comparison.

8 **MS. QUINN:** Correct, Your Honor. And I would respectfully  
9 disagree with that.

10 For example, in BicoCCA's case, we filed an amended  
11 complaint and, shortly thereaf- -- or we filed our original  
12 complaint and, shortly thereafter, filed an amended complaint.

13 In the intervening, I believe, six or eight months between  
14 the original complaint and the amended complaint, you know,  
15 there was no challenge to the complaint based on "first to  
16 file"; there was no intervening complaint or amended complaint  
17 by any of the other relators. And so we believe that,  
18 essentially, because those two filings -- right? -- even if,  
19 for example, we had simply filed six months later with our  
20 first amended complaint as the original pleading, that would  
21 stand on its own for purposes of a comparison of pleadings for  
22 "first to file."

23 **THE COURT:** All right. Well, I understand there are two  
24 views on this question, and I think I noted that, and there's  
25 some authority for each.

1 I do think that the *Branch II* case, which had a very  
2 extensive analysis and looked at the policy reasons, I find  
3 persuasive in analyzing not only the *Rockwell* decision, but  
4 some of the policy advantages of, for instance, having a  
5 clear-cut rule that's clear at the outset and, two, avoiding  
6 the anomaly of a relator who secures a place in line by filing  
7 skeletal allegations and then kind of -- and then being able to  
8 amend the complaint later on to sort of enhance its position  
9 and then getting the benefit of that.

10 I understand there's sort of two views of that, and your  
11 view is not without some support. But ultimately, I've got to  
12 decide one way or the other on this, and it seems to me that  
13 it's appropriate to look at the original complaint.

14 **MS. QUINN:** Understood. Thank you, Your Honor.

15 **THE COURT:** I understand this is one of those issues where  
16 reasonable people could differ. Reasonable courts have  
17 differed, I think.

18 Well, let's talk about the actual facts here. So we have  
19 a situation, comparing the first two, where there are some  
20 differences: first, the difference in named defendants and  
21 the sort of resulting geographic scope or at least related  
22 geographic scope.

23 It seems to me that the *Osinek* case is really centered on  
24 California. It seems very California centered. And  
25 although -- there's no implication -- although it names, kind

1 of identifies the practice generally, such as the use of the  
2 algorithms to mine advantageous coding, et cetera, it appears  
3 to me that there was no indication of a nationwide issue,  
4 whereas the Taylor case does expressly. And so I'd like to get  
5 comments on that.

6 There does seem to be a difference in scope in terms of  
7 the -- at least the regional aspect. And so one could argue  
8 that they are different in that regard and that the Taylor case  
9 should arguably survive, at least to the extent it involves  
10 regions other than California that was identified in the Osinek  
11 case.

12 **MR. LEVISS:** Your Honor, may I address those points?

13 **THE COURT:** Yes.

14 **MR. LEVISS:** Okay. So for starters, I would note that, as  
15 we noted in our briefs, that Osinek names Kaiser Permanente, a  
16 national brand that encompasses an integrated healthcare  
17 consortium, including the provider groups, hospitals, and plans  
18 in all of the regions where the Kaiser affiliated defendants  
19 provide their healthcare model. That's who Osinek sued.

20 Many of the later-filed complaints also identified Kaiser  
21 Permanente as a national entity. So there seems to be  
22 agreement among several of the relators that invoking  
23 Kaiser Permanente gives the allegations nation- -- national  
24 scope.

25 While it's not surprising that Ms. Osinek's allegations

1 are focused on California, where she was an employee and had  
2 the most familiarity, there's nothing in the complaint that  
3 suggests that she is alleging that these practices were somehow  
4 specific or limited to the California regions.

5 And, again, as Your Honor has noted, the primary test in  
6 "first to file" is whether the allegations in the first  
7 complaint gave the Department of Justice sufficient information  
8 that it could investigate broadly enough to uncover allegations  
9 elsewhere. Whether different practices or different regions or  
10 different members of the same corporate family, the case law is  
11 clear that the question is whether the relator has given DOJ  
12 enough information to go on. And here, that's demonstrably the  
13 case.

14 On the face of it, the Court can reach that conclusion;  
15 but because we also have the examples of the Government's  
16 several subpoenas that were issued when only the Osinek  
17 complaint was pending that we've asked the Court to take  
18 judicial notice of, it, in fact, addresses clearly that DOJ  
19 viewed these allegations as justifying an investigation of  
20 broader scope, both geographically and entities.

21 And lastly, I would point Your Honor to some of the cases  
22 that we've cited in our brief. *Batiste v. Sallie Mae, Hamilton*  
23 *v. Columbia HCA, Branch Consultants* all addressed  
24 second-in-time relators whose complaints expanded geographic  
25 focus but were found wanting under the first-to-file bar.

1           **THE COURT:** All right. Well, let me get the defense  
2 response to two points.

3           One is, the defendant, as described, although it's not  
4 a -- I guess it's more of a brand than anything, but it is not  
5 confined -- Kaiser Permanente is not confined to California.

6           And then on the notice point, as I adopted the kind of  
7 notice to the defendant, a yardstick for measuring relatedness,  
8 I guess the argument here is, the proof is in the pudding  
9 because the investigation that was triggered did exceed or go  
10 beyond just the state of California.

11           What's the response to that?

12           **MR. VOLDMAN:** May I speak to that point, Your Honor?

13           **THE COURT:** Yes. Yes.

14           **MR. VOLDMAN:** So a few points.

15           First, the standard that Kaiser is setting out asked the  
16 Department of Justice that every time a large brand that  
17 operates in multiple regions that runs large lines of business,  
18 the Department of Justice is functionally obligated to  
19 investigate their entire dealings with the Government program  
20 an FCA complaint deals with or risk chilling future  
21 whistleblower actions.

22           Here, that means Kaiser had plans in seven states covering  
23 nearly 3 million beneficiaries as of this year.

24           The subpoenas that the defendants point to aren't  
25 particularly instructive. First, they only provide a single

1 view of the investigation. And as all litigants know,  
2 investigations mold based on pushback and based on what  
3 the Government ends up focusing on.

4 But Attachment E to their RJM motion is particularly  
5 instructive for showing that Colorado is a different region,  
6 and Taylor brought different allegations, because it is issued  
7 after Taylor is filed and that is the only one specific to a  
8 region outside of California.

9 It's true that the initial subpoenas say things like "all  
10 regions" and boilerplate language that's included in HHS  
11 subpoenas; but after Taylor is filed, there is a subpoena  
12 specific to Colorado; and the United States ends up intervening  
13 against defendants in Colorado and not against defendants in  
14 the five other states Kaiser operates MA plans in.

15 Finally, it's not just the geographic difference. The  
16 difference in corporate functioning in different regions  
17 matters here. Because Kaiser didn't operate hospitals in the  
18 Denver area, the claim we're pursuing based on chart review was  
19 able to happen. There, Kaiser contracted with hospitals that  
20 had high error rates of diagnostic coding, and then reviewed  
21 those charts only for additional codes that benefited Kaiser  
22 financially. When it discovered codes that were erroneous and  
23 should have been deleted, thus costing Kaiser money, it did not  
24 delete those.

25 The *Branch* case, for example, is significantly different

1 because it is about a hurricane that struck houses in both  
2 Mississippi and Louisiana. There's no business difference with  
3 how insurance companies operated on one side of the state line  
4 or the other that anyone in that case points out.

5 Here, there's different schemes brought on by the  
6 different regions.

7 **THE COURT:** Well, all right. And I understand this is the  
8 high error rate with the true positives. I want to put that  
9 aside for a moment, the nature of the claims. I just want to  
10 ask you about the geographic scope.

11 When I look at the original -- well, the complaint, the  
12 original complaint in Osinek, it does identify Kaiser  
13 Permanente as a California corporation, although it does say  
14 it's one of the largest Medicare Advantage organizations in the  
15 country; but it does say -- it talks about Kaiser conducting  
16 business in California, providing healthcare services to the  
17 general public in California, and there's nothing in there that  
18 suggests a national scope.

19 But then, if we're using the notice-to-the-Government kind  
20 of yardstick, and if the allegations here are, given the  
21 upcoding and the use of algorithms and all that stuff, why  
22 wouldn't that have been enough -- whether it did or didn't is  
23 not actually necessarily the question -- but why wouldn't that  
24 be enough to give -- I don't know if you call it constructive  
25 notice, inquiry notice, whatever the analogy is -- the kind of

1 notice to the Government of potential facts that would have  
2 uncovered a nationwide problem? Why isn't that notice, sort  
3 of, standard satisfied here?

4 **MR. VOLDMAN:** Sure. So it's true that both cases are  
5 about fraud in the Medicare Advantage program; and obviously,  
6 upcoding is alleged in both cases; but that is only a product  
7 of upcoding being the basic unit of the way Medicare Advantage  
8 plans are paid. It is the same thing as saying overcharging on  
9 the contract.

10 Here, the Osinek complaint alleges a data-mining scheme  
11 that led to addenda in California. It makes no allegations  
12 about any of the other regions. And the other regions, like  
13 Colorado, specifically had different schemes that would not  
14 have necessarily made sense in California and did not happen in  
15 California.

16 That notice isn't enough for the Government to investigate  
17 those specific schemes, besides the fact that both are about  
18 Medicare Advantage.

19 The *Hartpence* case, like, clearly allows related, but  
20 distinct, frauds to go forward, and this is an example of that.

21 **THE COURT:** Well, what about the geographic? I understand  
22 your focus is a different kind of fraud. Before we get there,  
23 I'm asking: Why not notice of a geographic -- beyond  
24 geographic issue, beyond the borders of California?

25 **MR. VOLDMAN:** There are no allegations in the Osinek

1 complaint about any events happening with beneficiaries or  
2 physicians outside of California. We feel it's unreasonable  
3 for the Department of Justice to launch a nationwide  
4 investigation that affects lots of states, lots of Medicare  
5 beneficiaries, based on every time a False Claims Act complaint  
6 was filed.

7 And finding for the defendants here would likely lead to a  
8 chilling effect on whistleblowers, where if any defendant  
9 family was sued about any government program, it would  
10 necessarily block anything else about overcharging that  
11 government program by that defendant family.

12 **MR. LEVISS:** I share Mr. Voldman's view that it's  
13 unreasonable for the Department of Justice to investigate  
14 broadly, but the reality is they did so here.

15 **THE COURT:** Well, and I think the question is not what  
16 they did or didn't, because there may be a situation where they  
17 didn't but they had enough notice, and you might be arguing the  
18 opposite. I'd be curious whether the Government has any view  
19 on this particular question.

20 **MR. CHOE:** Your Honor, I think it's right in terms of what  
21 the Government did or didn't is not the issue here.

22 And in terms of the investigation, we were investigating  
23 California and Colorado. So we did not investigate every  
24 region of Kaiser.

25 And -- but I think Your Honor is exactly right, that what

1 the Government did or didn't is not the relevant question here.

2 **THE COURT:** Right. Do you have any views on the more  
3 theoretical construct? It's almost a form of, like,  
4 constructive notice. I mean, I'll use that as an analogy here.

5 It's not actually what the Government did in response, but  
6 should this be deemed enough notice such that it would bar a  
7 California-centered complaint, which alleges a practice which  
8 could be generalized, would then serve to bar all other  
9 regional complaints under the FCA? Does the Government have  
10 any view on that question?

11 **MR. CHOE:** I think, Your Honor, to the extent that if  
12 you're asking -- setting aside the specific allegations here in  
13 Osinek versus Taylor, we're not taking a position on the --

14 **THE COURT:** Yes.

15 **MR. CHOE:** -- specific motions before Your Honor.

16 But with respect to whether a complaint that alleges  
17 misconduct in California necessarily triggers the Government's  
18 notice or obligation to investigate the company nationwide, we  
19 would not take that position, no.

20 **THE COURT:** Yeah. Well, thank you.

21 Let me ask the defendants. I mean, there's something to  
22 this idea that any time anybody brings any FCA action in one  
23 state and seeks to confine its complaint to that state; but if  
24 it happens to be a regional organization, a national  
25 organization, which many are, especially if you look at

1 subsidiaries and affiliates and this sort of thing, that would  
2 have the effect -- if the first action only sought a California  
3 action, it would effectively bar all other actions in 49 other  
4 states. That seems troubling from an FCA point of view.

5 **MR. LEVISS:** I guess, Your Honor, we're not taking the  
6 position that in any hypothetical situation, allegations about  
7 a nationwide corporation's practices in one state would bar  
8 their practices in every state.

9 We are taking the position that in this complaint against  
10 a national consortium that has operations in seven regions,  
11 that the broad sweep of the allegations in Osinek's complaint  
12 that allege a broad upcoding scheme to knowingly submit false  
13 diagnosis codes to CMS for purposes of improperly increasing  
14 reimbursement under the Medicare Advantage risk adjustment  
15 program, it's the breadth of those allegations that potentially  
16 apply to Kaiser Permanente and Kaiser-affiliated defendants'  
17 practices in the other regions.

18 So just to be clear, we're not suggesting a broad rule  
19 that this would be the case in every case; but we're saying in  
20 the context of this complaint, it fits more squarely within the  
21 case law where adding geographic scope in a subsequent  
22 complaint was insufficient.

23 *In Re Natural Gas*, the first-to-file bar didn't apply to  
24 new corporate defendants that had no relationship to the  
25 existing defendants; but a corporate sub in a different

1 geographic region brought in by a second-filed complaint, those  
2 allegations were barred.

3 **THE COURT:** Well, that would suggest, even though you say  
4 you're not seeking that in this case, an overarching rule that  
5 once you bring in one region and, actually, against a  
6 corporation, to the extent that corporation has subs,  
7 affiliates in other parts of the country, it's hard to  
8 distinguish. As long as you allege kind of a systemic  
9 practice, which often it is, hard to avoid the nationwide bar  
10 consequence, it seems to me.

11 **MR. LEVISS:** Well, that may be a consequence of the -- of  
12 the results of a case like this, but it's not inconsistent with  
13 Congress's intent in adding the first-to-file rule. They  
14 wanted relators to bring their allegations to the Government as  
15 soon as possible so that DOJ could investigate as broadly as it  
16 determined was reasonable under the circumstances.

17 **THE COURT:** But it raises the stakes because if  
18 the Government decides it does not have the resources or the  
19 priorities -- because there's a lot of stuff going on with  
20 the Government -- if they decide not to do a nationwide  
21 investigation, that has the effect of barring all other  
22 actions. Nobody else can step in. It really puts pressure on  
23 the Government to say: Well, if we don't do it, everybody else  
24 is barred.

25 **MR. LEVISS:** Well, it does bar subsequent relators from

1 coming in afterwards. When the Government has already  
2 intervened, in part, in here and is proceeding with its own  
3 case, another relator could not then step in to bring new  
4 allegations. That wouldn't stop the Government from adding  
5 allegations to its own complaint if it deemed them appropriate.

6 **THE COURT:** All right. Let me ask you about the  
7 difference in the actual fraud claim here, that Taylor is a bit  
8 of sort of the flip side, in a sense, as I understand it.

9 It all involves upcoding. It all involves natural  
10 language processing software. I understand that. But the  
11 actual wrong here, as I understand it in Taylor, is ignoring  
12 the high error rates for certain diagnoses as opposed to sort  
13 of affirmatively mining things and doing other things to  
14 upcharge and upcode.

15 What's your response to that? It's a different kind of  
16 fraud. It's a different aspect. You could argue it's somewhat  
17 related, but it seems different.

18 **MR. LEVISS:** Well, I would take issue with the conclusion  
19 that it's a different kind of fraud but, rather, that it's a  
20 different argument for satisfying the False Claims Act element  
21 of knowledge, for example. Ultimately, the fraud that Taylor  
22 is alleging boils down to the fraud that Osinek is alleging:  
23 that the Kaiser defendants upcoded their diagnoses; that they  
24 submitted diagnosis codes to CMS that were unsupported for  
25 purposes of increasing risk adjustment compensation.

1           They point -- Taylor points to audits that they allege  
2 should have put the defendants on notice that certain diagnoses  
3 were unsupported. But that's no different from an argument,  
4 again, alleged in Osinek, that unsupported diagnoses are being  
5 submitted to CMS.

6           Any surviving complaint will need to establish knowledge  
7 under the False Claims Act. I don't see how Taylor has alleged  
8 a separate theory of False Claims Act liability resulting from  
9 these audits that's distinct from the underlying arguments that  
10 unsupported diagnosis codes were submitted.

11           **THE COURT:** All right. Mr. Voldman, your response?

12           **MR. VOLDMAN:** Sure.

13           So you're correct, Your Honor, in both the chart review  
14 and the natural language processing claims. We're not  
15 questioning what additional diagnoses Kaiser made through its  
16 audits and submitted to the Medicare Advantage program for  
17 additional premiums. We're questioning what was in there  
18 before.

19           One-way chart review theory has been recognized by this  
20 district in a case against Sutter and by the Central District  
21 in a case against United Health. Both those hinge on a plan  
22 being put on notice that its providers, in the case of Taylor's  
23 complaint specifically, in the chart review claims, external  
24 hospital systems were poorly coding diagnosis codes. Kaiser  
25 did an audit of those and added and fixed diagnosis coding when

1 it benefited it and decided not to fix diagnosis coding when it  
2 would have cost them money, in violation of the reverse False  
3 Claims Act.

4 So they are distinct buckets. We're not saying that  
5 anything Kaiser added through these audits is the problem.  
6 We're saying that the things that Kaiser failed to delete  
7 through these audits is the problem.

8 **THE COURT:** But it does involve intent, I mean, the same  
9 deliberate kind of conduct. It was a conscious conduct not to  
10 delete.

11 **MR. VOLDMAN:** Correct. Both the Osinek -- as Mr. Leviss  
12 pointed out, both the Osinek and the Taylor complaints would  
13 require a scienter pleading.

14 But the scheme at issue is quite different and, also,  
15 would not have made sense in California, where Kaiser operated  
16 its own hospitals and the incentives were aligned between  
17 providers, groups, and plan.

18 Here, we believe that Kaiser did this one-way chart review  
19 because the incentives weren't aligned. Hospitals were  
20 generally paid on a fee-for-service schedule, meaning for the  
21 services they did; while the plan was paid on a schedule based  
22 on the health of their beneficiaries. So that's why they did  
23 the review, and that's why the review wasn't done in  
24 California.

25 **THE COURT:** All right. Let me ask the Government, was --

1 as I understand it, the Taylor theory of fraud or that aspect  
2 of fraud -- sort of the non-fixing of the erroneous diagnostic  
3 codes when it benefited Kaiser; fixing it when it didn't  
4 benefit -- or maybe I have it reversed, but you know what I  
5 mean -- is that in the Government's case?

6 **MR. CHOE:** No, that is not part of the Government's  
7 complaint-in-intervention, no, Your Honor.

8 **THE COURT:** All right. Well, certainly, to the extent  
9 that there are high diagnosis -- high rates of errors for  
10 external providers, that adds yet another layer of distinction,  
11 it seems to me. I guess it still comes back to whether Kaiser  
12 could have fixed it; right? But the source of the error there  
13 is the external providers.

14 Is that my understanding, Mr. Voldman?

15 **MR. VOLDMAN:** Yes, that's right. And that Kaiser was on  
16 notice of their error rates and failed to fix it.

17 **MR. LEVISS:** But ultimately, Your Honor, what makes the  
18 codes unsupported is they're different. Taylor's argument is  
19 that the codes were unsupported. And when the audits were  
20 conducted, they allege that Kaiser then learned -- or had  
21 knowledge that they were unsupported and should have acted on  
22 them.

23 The ultimate alleged False Claims Act scheme is submitting  
24 unsupported diagnosis codes, which, again --

25 **THE COURT:** Well, that's like saying it's fraud. I mean,

1 anything to do with overcharge and not supported is covered, no  
2 matter how the methodology is. That seems kind of a broad  
3 sweep, Mr. Leviss.

4 **MR. LEVISS:** Well --

5 **THE COURT:** I --

6 **MR. LEVISS:** I'm sorry, Your Honor.

7 **THE COURT:** Yeah. Go ahead.

8 **MR. LEVISS:** It's not the same as saying any kind of  
9 overcharging. In fact, there are lots of different business  
10 practices within the Medicare Advantage program. These  
11 complaints all concern the identification of diagnosis codes  
12 and submission of diagnosis codes for risk adjustment purposes,  
13 and they all allege the upcoding, the submission of unsupported  
14 diagnosis codes.

15 So we don't agree with the characterization that upcoding  
16 is the same as saying there's fraud. In this instance, all six  
17 complaints are alleging the same material fraudulent --  
18 allegedly fraudulent scheme involving submitting unsupported,  
19 improper diagnosis codes to increase risk adjustment income.

20 **THE COURT:** All right. Let me just turn briefly to the  
21 Stein complaint. To the extent that the focus there is on two  
22 specific conditions, sepsis and malnutrition, how is that -- I  
23 understand that there's a different focus; but seems like the  
24 same general mechanism is sort of the same there. Why does  
25 Stein -- why would Stein not being deemed sufficiently related

1 for the "first to file"?

2 **MR. ZINBERG:** Thank you, Your Honor.

3 First, I want to take a second and address the previous  
4 statement. I think your analysis regarding the defendants'  
5 position is correct. Saying that submitting increased risk  
6 adjustment codes is different than saying fraud simply doesn't  
7 hold any water, not in the Medicare Advantage situation,  
8 because the risk adjustment codes are the basis of all of the  
9 payments that come later. So any fraud involving Medicare  
10 Advantage at some point is going to have to, by necessity, have  
11 an upcoding or an invalid code submitted to CMS.

12 Now, what I referred to as our unintervened claims are  
13 quite distinct from the Refresh program. As you know, our  
14 complaint also had what's colloquially known as the  
15 "refresh fraud"; and we conceded that the prior-filed  
16 complaints put the Government on sufficient notice where we  
17 were not challenging "first to file" on the refresh frauds.

18 But with respect to the sepsis claim, for example, it's a  
19 completely different type of fraud. One, it didn't involve any  
20 data mining. It didn't involve any addendums. It doesn't  
21 involve the coders making leading queries and instructing  
22 physicians what codes to insert. In fact, it's the opposite.  
23 The coders -- this fraud takes place on two levels, which is  
24 also distinct from the allegations of the prior complaint. One  
25 is on the ground, in the hospital, the way that the physicians

1 are diagnosing, making the sepsis diagnosis; and the second is  
2 the way the coders are being instructed to code it.

3 Here, the coders are being instructed not to query sepsis,  
4 even though the coding guidelines instruct them that they have  
5 to query for sepsis to properly document the medical record and  
6 rule out some instances where the sepsis should not be coded.

7 They are also -- the coders are also instructed to code  
8 sepsis whenever the term "sepsis" is used, regardless of the  
9 quality of the documentation in the medical record. And,  
10 again, those are against the coding guidelines of the ICG9 and  
11 the AHIMA ethical coding guidelines.

12 So it is not a fraud that would be investigated and  
13 reached by investigating the allegations of the refresh fraud  
14 of the complaint of Osinek and her allegations and the Arefi  
15 and Taylor complaints, which all deal with some aspect of what  
16 I refer to as the refresh frauds, whether regionally or  
17 nationally.

18 Now, our clients are in Southern California, and they had  
19 a lot of detailed information about Southern California and  
20 Northern California and believed that these frauds were picked  
21 up and used nationally.

22 Now, the malnutrition is similarly --

23 **THE COURT:** Let me stop you on the sepsis for a moment  
24 there.

25 **MR. ZINBERG:** Sure.

1           **THE COURT:** Isn't there an allegation that there's some  
2 direction or some incentive for doctors, physicians, to  
3 indicate sepsis?

4           **MR. ZINBERG:** Sepsis is a very high risk adjustment  
5 factor. So if a medical group was interested in committing  
6 fraud, using the higher risk adjustment factors is going to be  
7 the most productive way to do it. So in that regard, there is  
8 an incentive.

9           There was also a mention of sepsis in the Arefi complaint,  
10 where he had some sort of statistical analysis saying he  
11 believes that the Kaiser Hospitals have sepsis coded too  
12 frequently, but he didn't really explain how that came about.

13           Our complaint addressed how at least a significant portion  
14 of that came about because of the quite different coding  
15 practices that were adopted with regard to hospital inpatient  
16 sepsis cases.

17           So we think that this is completely unrelated to the  
18 refresh fraud and not something that would logically fall under  
19 its purview.

20           **THE COURT:** Let me just stop you on that and get the  
21 defense perspective on why this is not related or why this is  
22 related.

23           **MR. LEVISS:** Thank you, Your Honor.

24           Well, for starters, I'd like to address Mr. Zinberg's  
25 threshold statement that risk adjustment codes are the basis

1 for all payments in Medicare Advantage. It's just demonstrably  
2 untrue. Plans are paid on other bases besides risk adjustment.  
3 That's not the question you asked, but I can't let that go  
4 unaddressed.

5 **THE COURT:** All right. But I'd like you to address the  
6 sepsis. I'm kind --

7 **MR. LEVISS:** Yes.

8 **THE COURT:** -- of beyond that now.

9 Thank you.

10 **MR. LEVISS:** Okay. Thank you, Your Honor.

11 So the allegations about sepsis upcoding ultimately boil  
12 down to a similar diagnosis scheme as alleged in Osinek.  
13 Osinek lists various examples of diagnoses that she alleges are  
14 identified through the allegedly improper practices. She  
15 doesn't say that her list of diagnoses is exclusive, and it  
16 certainly would be sufficient to put the Government on notice  
17 to explore other diagnoses practices -- other diagnoses that  
18 are addressed through the same practices.

19 **THE COURT:** What's the most similar aspect of the scheme  
20 in Osinek that you think brings it close to the sepsis  
21 allegation here? Which seems a little different in that the  
22 direction is, as I understand it, for the coders to just accept  
23 it without any kind of query.

24 **MR. LEVISS:** Well, Osinek's alleges that the -- that  
25 Kaiser Permanente pressured physicians to diagnose risk

1 adjusting conditions, that it had guidance and policies that  
2 were targeting high-value conditions for risk adjustment  
3 purposes. I think that fairly captures Stein's sepsis  
4 allegations within its ambit.

5 **THE COURT:** Okay. I don't know if Stein specifically  
6 indicates there's an express directive or guidance to sort of  
7 upcode, upcharge, or find sepsis when it's questionable whether  
8 it's there.

9 **MR. ZINBERG:** We do not, Your Honor.

10 What we alleged was a scheme where sepsis was  
11 intentionally overcoded to ensure that no sepsis codes were  
12 missed as a matter of safety.

13 As a matter of safety, patient safety, Kaiser adopted  
14 sepsis protocols that would knowingly overdiagnose sepsis  
15 cases, but then failed to identify and readjust the cases that  
16 were not, in fact, sepsis; that were due to a much simpler  
17 ailment like a urinary tract infection or some other mild  
18 condition rather than the life-threatening condition of sepsis  
19 with organ dysfunction.

20 And we identified very specifically that the fraud dealt  
21 with patients that were being held in observation in the  
22 emergency room and not admitted to the hospital at all and  
23 discharged after a short stay of one to two days or admitted to  
24 the hospital, but not the ICU, and, likewise, discharged very  
25 soon afterwards.

1           **THE COURT:** All right. But you've indicated that there  
2 were Kaiser protocols that were --

3           **MR. ZINBERG:** Sepsis protocols.

4           **THE COURT:** -- sepsis protocols that aggressively  
5 diagnosed and perhaps overly diagnosed sepsis in the first  
6 instance.

7           And its the failure to correct afterwards -- the  
8 combination of that plus the failure to request afterwards that  
9 resulted in the upcharges; correct?

10           **MR. ZINBERG:** Yes, which is not at all the allegations in  
11 the Osinek complaint, which is a data-mining coding scheme to  
12 identify every missed code after the fact.

13           **THE COURT:** Well, that wasn't the only allegation.

14           **MR. ZINBERG:** And so --

15           **THE COURT:** That wasn't the only allegation. The other  
16 allegation is pressuring doctors to --

17           **MR. ZINBERG:** And --

18           **THE COURT:** -- stand diagnoses and capture high HCCs, and  
19 sepsis is one of those.

20           **MR. ZINBERG:** Yes, but as part of their Refresh program.  
21 All of that was under the ambit of their Refresh program --

22           **THE COURT:** Well, all right. But --

23           **MR. ZINBERG:** -- where --

24           **THE COURT:** The more you finely cut that, the more  
25 difficult it is against the notice standard, it seems to me.

1 Again, it doesn't have to be exactly the same; it's got to be  
2 within the ballpark enough to give notice.

3 Let me ask the Government again. Are the sepsis and  
4 malnutrition upcoding practices alleged in the Stein case part  
5 of the Government's case?

6 **MR. CHOE:** No, Your Honor, that's not part of  
7 the Government's complaint-in-intervention.

8 **THE COURT:** Okay.

9 **MR. LEVISS:** Your Honor, can I just make one point  
10 addressing the significance of whether these allegations are in  
11 the Government's complaint or not?

12 **THE COURT:** Yeah.

13 **MR. LEVISS:** We're not arguing in this motion that the  
14 later-filed allegations would be outside the complaint. We're  
15 arguing that the later-filed relators are not the appropriate  
16 plaintiffs to bring those allegations. The allegations all  
17 fall within Osinek's complaint. So the fact that they're not  
18 part of the intervention complaint isn't ultimately material to  
19 the first-to-file analysis.

20 **THE COURT:** All right. Let me just briefly touch on  
21 Bryant. I understand that there are --

22 **MR. ZINBERG:** Your Honor, you want to discuss the other --

23 **THE COURT:** I have your brief, and I've got to move on,  
24 because there's a lot here. So, thank you.

25 **MR. ZINBERG:** Thank you, Your Honor.

1           **THE COURT:** On Bryant, I'm a little confused because  
2 there's some reference to the Affordable Care Act, but the  
3 causes of action are based solely on Medicare, not on the  
4 Affordable Care Act. Do I have that correct?

5           **MR. LEWIS:** No, Your Honor. The causes of action  
6 incorporate all of the prior allegations in the complaint,  
7 which include a number of paragraphs devoted to the  
8 Affordable Care Act, the specific allegations, including that  
9 there was fraud on the Affordable Care Act program. And all of  
10 those allegations are swept into those claims.

11           It is true that the claims have a specific reference to  
12 Medicare Advantage. They do not have a specific reference to  
13 Affordable Care Act. But that is a difference without a  
14 distinction, in our view.

15           **THE COURT:** Why is that a difference without -- why isn't  
16 that rather important?

17           **MR. LEWIS:** Well, Your Honor, in incorporating all the  
18 prior allegations in the complaint, including paragraph 7  
19 through 9 of our introduction to the schemes that were alleged  
20 in the complaint, we allege quite clearly that the Affordable  
21 Care Act was a program that was defrauded, in addition to the  
22 Medicare Advantage program.

23           **THE COURT:** Where in the -- if I were to look at the --  
24 I'm looking at your complaint. Where do I find a cause of  
25 action that's based on Affordable Care Act?

1           **MR. LEWIS:** Well, Your Honor, Counts One through Four all  
2 allege that the schemes that are alleged throughout the  
3 remainder of the complaint give rise to causes of action under  
4 the False Claims Act, and we intended to incorporate the  
5 schemes that we alleged above in the bulk of the complaint that  
6 included both Medicare Advantage and Affordable Care Act.

7           **THE COURT:** So the incorporation paragraph, for instance,  
8 at page -- at paragraph 208?

9           **MR. LEWIS:** Yes.

10          **THE COURT:** Is that what you're relying on?

11          **MR. LEWIS:** Yes, paragraph 208; similar, paragraph 213 in  
12 the second claim for relief; paragraph 218 in the third claim;  
13 paragraph 223 in the fourth claim.

14          **THE COURT:** All right. What's the defense response on  
15 that particular question?

16          **MR. LEVISS:** Well, we agree with the observation that  
17 Bryant has not actually alleged a cause of action specifically  
18 stemming from defrauding the Affordable Care Act.

19           To the extent that Your Honor is persuaded that the  
20 paragraphs cited there do allege a cause of action, it's clear  
21 from the complaint itself that Bryant alleges that the upcoding  
22 of ACA risk adjustment claims occurred in the same manner and  
23 pursuant to the same scheme as the alleged MA upcoding scheme.  
24 They're alleging the same specific activities and scheme that  
25 is itself barred by Osinek's first-filed Medicare Advantage

1 scheme. So we would say that Osinek alerted DOJ to upcoding of  
2 risk adjustment diagnosis data. If it happened in the same  
3 manner, then it certainly should cover these derivative  
4 allegations, to the extent that the Bryant complaint links the  
5 Affordable Care Act to these --

6 **THE COURT:** So it's still covered by the FCA first-to-file  
7 bar?

8 **MR. LEVISS:** Correct.

9 **MR. LEWIS:** May I respond, Your Honor?

10 **THE COURT:** Yeah, briefly.

11 **MR. LEWIS:** Thank you.

12 You don't see Affordable Care Act anywhere in the Osinek  
13 complaint. You don't see it anywhere in the other complaints,  
14 both before or after the Bryant and Hernandez complaint, and  
15 there's a reason.

16 Ms. Bryant and Mr. Hernandez were senior folks. And  
17 Ms. Bryant, in the national office of Kaiser, she saw a big  
18 picture, a much bigger picture than the other relators. She  
19 saw that this fraud was not limited to Medicare Advantage. She  
20 saw that it extended to an entirely different program run by  
21 the Health and Human Services, not by CMS, and she brought it  
22 to the Government's attention.

23 And, you know, if Kaiser wants to live by the subpoenas  
24 that it issued and wants to make a big issue on judicial notice  
25 about those subpoenas, those subpoenas don't mention the

1 Affordable Care Act either. The Government wasn't on notice  
2 until the Bryant and --

3 **THE COURT:** How do you deal with -- the bar itself says it  
4 reaches a related action based on the facts underlying the  
5 pending action. That suggests that you look at the operative  
6 facts and not necessarily whether that violates, you know, one  
7 government program versus another. If it's the same facts, why  
8 doesn't that come within the reach of the first -- even if it's  
9 framed as a different violation, a different program, isn't it  
10 the same facts?

11 **MR. LEWIS:** It's not actually, Your Honor. The facts are  
12 that the Osinek complaint and the others alerted the Government  
13 to Medicare fraud. Medicare beneficiaries are, of course,  
14 older folks that are beneficiaries of the Medicare program,  
15 including Medicare Advantage.

16 Nothing would have alerted the Government to look at  
17 recipients of Affordable Care Act insurance, including newborn  
18 infants that were defrauded in the vent dependents scheme,  
19 among others.

20 **THE COURT:** But isn't the conduct -- isn't the wrongful  
21 conduct the same? You may say that the clientele may be a  
22 little different from program to program, but wouldn't the same  
23 upcharging, data mining, all that stuff, the incentivization,  
24 isn't that all the same?

25 **MR. LEWIS:** You know, Your Honor, if they attempted to

1 defraud the Government in two different ways using similar  
2 methods, I suppose you could say -- you could say it's similar  
3 frauds, but they're not. They're two different frauds  
4 committed on two different programs of the United States  
5 Government. And the fact that they use similar methods, for  
6 convenience or otherwise, shouldn't rule the day, in our view.

7 **THE COURT:** All right. What's the response to that?

8 **MR. LEVISS:** The alleged fraud is and derives from the  
9 same alleged fraudulent scheme. Mr. Lewis concedes that his  
10 client identified the fraud, this fraud. And the allegations  
11 in the complaint, sparse as they are, that refer to the  
12 Affordable Care Act suggest that the same practices, the same  
13 manner of this scheme applied to risk adjustment. It fits  
14 squarely within the first-to-file bar because they're not  
15 alleging a different -- materially different fraudulent scheme  
16 that would put the Government on notice of something distinct.

17 **THE COURT:** All right. Let me just conclude if I have any  
18 questions here on the Bicocca case.

19 Claims pursuant to the California FCA are not subject to  
20 the federal FCA first-to-file bar. Is that agreed? Is that a  
21 principle that we agree on?

22 **MR. LEVISS:** It is, Your Honor, although I believe those  
23 allegations have been withdrawn.

24 **THE COURT:** Oh. Is that correct?

25 **MS. QUINN:** Yes. I agree with Mr. Leviss, Your Honor.

1           **THE COURT:** All right. So what's left then?

2           **MS. QUINN:** Well, Your Honor, given the Court's position  
3 on the operative complaint to be reviewing, unfortunately, I  
4 don't think much.

5           **THE COURT:** All right. Well, I appreciate your frankness  
6 on that.

7           All right. Well, there's a couple -- obviously, there's  
8 some pretty major issues here. I want to take a second look at  
9 it. This argument has been helpful. It's clarified some  
10 things. And we didn't get to address every single issue, but  
11 I think we addressed the major ones. And I'm going to take a  
12 second look at the authorities, and I'll take the matter under  
13 submission.

14           Thank you. Thank you for your help.

15           **ALL:** Thank you, Your Honor.

16                           (Proceedings adjourned at 2:28 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, May 30, 2022

A handwritten signature in black ink that reads "Ana Dub". The signature is written in a cursive, slightly slanted style. It is positioned above a horizontal line that spans the width of the signature area.

Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG  
Official United States Reporter