

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

UNITED STATES OF AMERICA	)	
ex rel. RONDA OSINEK,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	<b>NO. C 13-03891 EMC</b>
	)	
KAISER PERMANENTE FOUNDATION	)	
HEALTH PLAN, INC., and THE	)	
PERMANENTE MEDICAL GROUP,	)	
INC.,	)	
	)	
Defendants.	)	
	)	

San Francisco, California  
Monday, December 4, 2023

**TRANSCRIPT OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS**

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CSR No. 7445, Official U.S. Reporter

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1 Monday - December 4, 2023

10:24 a.m.

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

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4 **THE CLERK:** The Court will now be hearing the case  
5 Osinek, et al. vs. Kaiser Permanente, Case Number 13-3891.

6 Counsel, please state your appearance for the record,  
7 beginning with the plaintiff.

8 **MR. CHOE:** Good morning, Your Honor. Shiwon Choe on  
9 behalf of the United States.

10 **THE COURT:** All right. Thank you, Mr. Choe.

11 **MR. MOSKOWITZ:** Good morning, Your Honor. David  
12 Moskowitz on behalf of the United States.

13 **THE COURT:** Thank you, Mr. Moskowitz.

14 **MR. GROSSMAN:** Good morning, Your Honor.

15 **MR. BLALACK:** Your Honor, Lee Blalack on behalf of the  
16 defendants, along with my colleague Kyle Grossman.

17 Mr. Grossman will be arguing for the defendants today.

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

19 Thank you, Mr. Grossman.

20 So I think front and center is the question of the  
21 Supreme Court's decision in *Richmond* and whether that precludes  
22 equitable defenses such as estoppel. And I think ratification  
23 is very similar to that.

24 I understand that it's clear that if there is estoppel  
25 being used to obtain, affirmatively, funds that are in

1    contravention of congressional appropriation or not authorized,  
2    that's problematic from a separation of powers point of view.  
3    But here, estoppel is being used defensively.  And so it's not  
4    being used as part of an affirmative claim to get benefits but  
5    as a defense to a claim to take back benefits, in a sense, that  
6    were given.  Is there a difference?  And if so, why should  
7    there be a distinction?

8            So I'll put that on Kaiser's block, to start with.  
9    Why doesn't -- in short, why doesn't *Richmond* apply to this  
10   circumstance?

11           **MR. GROSSMAN:**  Well, Your Honor, I think for some of  
12   the reasons you were just touching on, *Richmond's* holding was  
13   limited.  It was about a plaintiff who sought to use estoppel  
14   offensively.  And the Court there refused to adopt a flat rule  
15   for claims of estoppel against the Government and focused  
16   specifically on the type of claim that was presented there,  
17   which was a claim for payment of money from the public  
18   Treasury.

19           **THE COURT:**  So if this were a different scenario and,  
20   let's say -- I don't know if it's possible under the scheme.  
21   But if Kaiser didn't get paid because CMS said, "Wait a minute.  
22   We don't like your code, and there's something wrong going on  
23   here.  You didn't give us enough documentation to show that --  
24   to support the coding," et cetera, et cetera; and then Kaiser  
25   then said, "No, we're entitled to this.  You're wrong.  Give us

1 the money. And, by the way, you didn't object to this earlier  
2 or you did some things to estop us," wouldn't estoppel apply in  
3 that case?

4 If it happened to be that they were shorted -- if, in  
5 the first instance, Kaiser were shorted and then sued  
6 the Government for its wrongful withholding, that would be an  
7 estoppel-type claim that would fall within *Richmond*, wouldn't  
8 it?

9 **MR. GROSSMAN:** Yes. If Kaiser was seeking funds that  
10 had not already been paid from the Treasury, then that would  
11 more clearly fall within *Richmond's* scope.

12 But that is not what we have here. We're having  
13 the Government seeking to unwind payments already made over a  
14 series of years and then, on top of that, to significantly  
15 penalize defendants to the tune of hundreds of millions, if not  
16 billions, of dollars, not to stop the payment from being made,  
17 as was the case in *Richmond*.

18 **THE COURT:** But it seems like as a matter of  
19 principle, it's sort of the same thing. At the end of the day,  
20 it's a fight between Kaiser and the Government as to how much  
21 money Kaiser should have and the Government should have.

22 And why should this separation of powers notion, which  
23 is kind of a broader notion, turn on who got the money first  
24 and whether it got there first and they want it back or they  
25 never gave it to you and now you want it. It seems like,

1 financially, it's the same thing at the end of the day.

2 **MR. GROSSMAN:** Yes, Your Honor, but *Richmond* was also  
3 not a case where you had significant penalties and treble  
4 damages at issue, as we do in this case as well.

5 And we have seen cases where courts in -- you know, in  
6 the Ninth Circuit and the Central District specifically have  
7 allowed estoppel defenses and other equitable defenses to  
8 proceed through discovery. We have the *Mei Ling* case and also  
9 the *Paxton* case in the Central District.

10 So we would submit that at this stage of the case  
11 where, you know, discovery is still proceeding and we do not  
12 have a full sense of every claim at issue and the facts  
13 surrounding every potential allegedly false claim, the Court  
14 should wait until the facts are developed and see what happens  
15 through discovery to make a determination about whether this  
16 type of defense could apply to this case.

17 **THE COURT:** All right. Well, let me ask  
18 the Government.

19 I see your argument, and there's some cases that have  
20 held that the estoppel theory can be applied defensively when  
21 there's some money collected under the FCA, lower court cases.

22 But what about Mr. Grossman's point about penalties,  
23 treble damages, punitive damages? That's not recovery of money  
24 coming out of the Treasury based on a congressional  
25 appropriation. That's just a penalty. That's sort of new

1 money coming from the defendant. Why should that be governed  
2 by *Richmond*?

3 **MR. MOSKOWITZ:** Thank you, Your Honor.

4 First, if I could just quickly say, the *Fowler* case  
5 from the Ninth Circuit dealt with defense of retention of  
6 public funds and applied it in a defensive manner. So I think  
7 we have more than just lower court cases. We actually have a  
8 Ninth Circuit case that applied it in a defensive manner in  
9 that case.

10 But getting to your question, the issue here is that,  
11 ultimately, these equitable defenses are not available where,  
12 to quote *Fowler*, public money is at stake or, to quote *Richmond*  
13 dealing with involving payment from the Treasury. And we don't  
14 see anything in these cases that would necessarily allow in any  
15 way, shape, or form the Court to kind of parse which parts of  
16 the claim equitable estoppel would apply to or not.

17 And the idea of it is that when we're talking about  
18 public money from the Treasury, it's Congress that controls.  
19 And Congress can pass a statute, and it can provide whatever  
20 remedies it wants and whatever defenses it wants. And so it's  
21 done so through the False Claims Act. It's provided numerous  
22 defenses that Kaiser can rely on. It's imposed significant  
23 standards on the Government to prove a false claim. And that's  
24 what controls. There's no room for courts of equity to step in  
25 and to rewrite the law.

1           And I would note that, you know, numerous courts,  
2 including the *Palin* case in virtually identical circumstances,  
3 have correctly held that these defenses are unavailable to a  
4 Medicare Advantage organization in this type of FCA action in a  
5 defensive manner. And we cited to numerous other cases.

6           And so we would also note that, you know, there are  
7 general principles of equity that are underlying both *Richmond*  
8 and other case law. Right?

9           So *Richmond* cites as a basis for its decision the  
10 *Pangilinan* decision, 486 U.S. 875, which is an earlier  
11 Supreme Court case, saying part of the basis of its decision is  
12 that (as read):

13           "Courts of equity can no more disregard  
14 statutory and constitutional requirements and  
15 provisions than can courts of law."

16           And there's a long tradition that equity cannot defeat  
17 statutory penalties specified by Congress. And so, ultimately,  
18 at the end of the day here is that Congress has specified the  
19 remedies at issue, it specified the elements, it specified the  
20 defenses, and there's no room for a court of equity to create  
21 other defenses to the claim.

22           **THE COURT:** Does that suggest that the common law  
23 defenses, equitable defenses, can never be asserted against the  
24 federal government?

25           **MR. MOSKOWITZ:** No. So this is unique -- this is --

1 this -- specifically, as *Richmond* held -- right? -- it's  
2 focused on this narrow issue about payment from the Treasury  
3 and when it's dealing with the appropriations clause and public  
4 funds. And so we are not making a broader claim generally. It  
5 is -- it is a specific claim here.

6 **THE COURT:** But there are no payments from the  
7 Treasury if punitive damages are disallowed or treble damages  
8 are disallowed.

9 **MR. MOSKOWITZ:** Well, so, for example, in the  
10 *Bornstein* case, the Supreme Court actually held that -- and at  
11 the time, it was double damages -- that the double damages were  
12 actually compensatory to the Government related to public money  
13 being at stake. And so, you know, it's kind of hard to draw  
14 the line as to what is a penalty and what is compensatory in  
15 these circumstances.

16 But ultimately, we don't see what -- the principle  
17 applies generally to a case involving public money at stake,  
18 and it's certainly allowable that Congress can specify that  
19 there's a penalty on top of returning the money in order to  
20 prevent the misappropriation of public funds and to otherwise  
21 deal with that.

22 And it's up to Congress to specify if there would be  
23 some other defense, and they certainly specified a number of  
24 defenses here that Kaiser has availed themselves of. And we  
25 think that, you know, that's a decision for Congress; and if

1 Kaiser doesn't like the FCA or other people don't, you know,  
2 they can go ask Congress to create these defenses.

3 **THE COURT:** Is there something akin to a presumption  
4 that, absent Congress's recognition of a defense, you can't  
5 assert a defense that Congress hasn't authorized?

6 **MR. MOSKOWITZ:** So, I mean, I think that's effectively  
7 what *Richmond* is saying in the context of the appropriations  
8 clause, is that it is a very specific focus that one branch of  
9 government has control over the public fisc, and that one  
10 branch is Congress. And so when we're talking about, you know,  
11 these actions involving the public fisc, it is up to Congress  
12 to specify those.

13 **THE COURT:** That's why I'm asking. So does that  
14 translate into a presumption, in an operative way, that unless  
15 you see something in a statute, you presume that if Congress  
16 didn't authorize it, you cannot assert, for instance, an  
17 equitable or common law defense?

18 **MR. MOSKOWITZ:** In a case involving, yes, payment from  
19 the Treasury, yes.

20 **THE COURT:** Are there any cases that actually use the  
21 term "presumption"? I mean, I use that because --

22 **MR. MOSKOWITZ:** I'm not --

23 **THE COURT:** -- that's an easy way for a court to  
24 understand it, so...

25 **MR. MOSKOWITZ:** I'm not aware of it. I'm not even

1 sure it's really a presumption in the sense that I think it's  
2 kind of an absolute situation that, you know, Congress has  
3 control of the spending of public funds, and so we look to what  
4 Congress has done.

5 **THE COURT:** All right. Response, Mr. Grossman?

6 **MR. GROSSMAN:** Your Honor, I would just emphasize that  
7 there are -- there are cases on both sides of this issue.

8 If it's difficult for the Court to draw a line now,  
9 then we would submit that it would be better for the Court to  
10 wait to see how the facts develop in discovery on these  
11 defenses and then make a decision at summary judgment, as the  
12 Court -- this Court decided to do in the *Academy Mortgage*  
13 *Corporation* case when it was considering an equitable defense  
14 failure to mitigate; as the Court in *United States ex rel.*  
15 *Jordan vs. Northrop Grumman* did; as the *Rite Aid* court did in  
16 the Eastern District; as *United States ex rel. Dye vs. ATK*  
17 *Launch Systems* did in also considering equitable defenses,  
18 including a failure to mitigate defense; and just recently in  
19 November, the Eastern District of Pennsylvania in *United States*  
20 *vs. American Health Foundation* at 2023 Westlaw 7329506 also  
21 concluded that a motion to strike is not the appropriate  
22 procedure to determine disputed or unfair questions of law and  
23 allowed a failure to mitigate defense to proceed in that False  
24 Claims Act case.

25 **THE COURT:** All right. Let me ask, if we go on to the

1 actual merits, and that is if it were theoretically available  
2 here, whether there has been enough to assert, for instance,  
3 estoppel.

4 And generally, estoppel as against governments  
5 requires that the Government engage in affirmative misconduct  
6 going beyond mere negligence that would cause a serious  
7 injustice.

8 And here, my understanding of the estoppel argument is  
9 that CMS knew that Kaiser had a different interpretation and  
10 application of the ICD guidelines but failed to provide clear  
11 guidance knowing they were going down the wrong road. But  
12 there's no allegation they said anything affirmative like,  
13 "Yeah, you're doing a good job; this is fine," and then turning  
14 around and saying, "No, it's not fine."

15 So how is the basic element of estoppel met here?

16 **MR. GROSSMAN:** Your Honor, it is more than that. We  
17 are alleging that CMS, you know, not only knew about  
18 defendants' interpretation of the ICD guidelines, but also took  
19 actions, like specifically stating that provider documentation  
20 of a diagnosis is enough to support submission of the diagnosis  
21 code to CMS; that CMS repeatedly approved diagnosis codes  
22 submitted to CMS through RADV audits year after year; that CMS,  
23 you know, through those -- through those actions, approved  
24 diagnosis codes coded in compliance with guidance as CMS  
25 represented that guidance to us.

1           And now it is refusing to provide clear guidance, you  
2 know, to anyone in the industry on how to interpret the  
3 contested provision, including defendants in this case; and is,  
4 through this lawsuit, essentially going back on those  
5 communications and those actions.

6           So we think that at this stage of the case, those  
7 allegations should be sufficient to show affirmative  
8 misconduct.

9           **THE COURT:** All right. Response from the Government?

10          **MR. MOSKOWITZ:** Sure.

11          So we should start off with that the Government  
12 supposedly knew the interpretation. But as we pointed out,  
13 Kaiser, they won't allege what the interpretation is; so we  
14 don't have any idea whether the supposed interpretation has any  
15 relevance even to this case.

16          The only affirmative statement, which Your Honor, you  
17 know, drew attention to right away correctly, is -- the only  
18 affirmative statement alleged is that, quote -- my apologies  
19 here -- quote, that CMS has stated that healthcare provider  
20 documentation of a diagnosis in the beneficiary's medical  
21 records is acceptable support.

22          Well, that's not remotely relevant to this case. The  
23 fact that you can submit healthcare provider documentation as  
24 support does not in any way resolve the issues in this case,  
25 where we've alleged, as you may recall from months back, that

1 Kaiser created addenda, often long after the visit, to make it  
2 appear that diagnoses existed or to make it appear as if they  
3 were addressed at the visit when they were not, and they did so  
4 to collect hundreds of millions of dollars.

5 The fact that CMS may have said, you know, "We'll look  
6 at healthcare provider documentation" tells you nothing more  
7 than if they had said, "We're going to look at your annual  
8 certifications, and if you certify, you know, that's going to  
9 be acceptable."

10 Well, that doesn't get to the issues of this case at  
11 all. And to say that the Government is estopped and agreed to  
12 their interpretation because the Government said that it will  
13 look at healthcare provider documentation, that's what the  
14 problem here is. And when they won't say what the  
15 interpretation is and they won't say what the affirmative  
16 misrepresentation is, we're not remotely close to stating a  
17 claim for estoppel here, and especially an affirmative  
18 misconduct-type case, which is -- you know, the Ninth Circuit  
19 has defined to be a -- excuse me -- a deliberate lie or a  
20 pattern of false promises.

21 **THE COURT:** All right. Well, one could argue that  
22 that's the kind of matter that seems more fact intensive and  
23 could warrant development, although I do have to look at  
24 the all- -- if I got to there, I would have to look at the  
25 allegations to see whether they are sufficient to state an

1 affirmative defense.

2 **MR. MOSKOWITZ:** And --

3 **THE COURT:** Let me ask --

4 **MR. MOSKOWITZ:** -- Your Honor -- oh, my apologies.

5 We're only, on that part, only saying, you know, they  
6 should plead it. We're not saying that's the failure as a  
7 matter of law. We're just saying --

8 **THE COURT:** I see.

9 **MR. MOSKOWITZ:** -- they should plead it.

10 **THE COURT:** All right. If that defense is cognizable,  
11 which is the first --

12 **MR. MOSKOWITZ:** Right.

13 **THE COURT:** -- question.

14 Let me ask you. On the failure to mitigate, I  
15 understand that that also is an equitable defense, and there's  
16 an argument that that falls under the umbrella or penumbra of  
17 *Richmond*.

18 But the failure to mitigate, in a way, is available,  
19 not necessarily as an affirmative defense, but it can be  
20 relevant, depending on the conduct. It may go to *scienter* --  
21 right? -- whether there's a requisite *scienter* of the defendant  
22 if there's a claim along these lines, that they're -- I'm not  
23 saying it's dispositive, but it seems to me one could see where  
24 the evidence that the defendants want to proffer on what they  
25 were told by the Government and what they thought they were

1 hearing and how they were sort of, quote, misled, even if there  
2 was no affirmative conduct, that would be relevant, perhaps not  
3 as a formal affirmative defense, but that could go to the  
4 question -- could be probative of the ultimate issue of  
5 *scienter*, isn't it?

6 **MR. MOSKOWITZ:** So, depending on how the facts would  
7 turn out, there certainly -- *scienter* is focused on the state  
8 of mind -- as the Supreme Court emphasized in the recent  
9 *SuperValu* case, it's focused on the state of mind of Kaiser.

10 And so if they in good faith believed something to be  
11 true and they, to some degree, relied on conversations with  
12 the Government, that may play a role in the *scienter* analysis.  
13 But it's not -- you know, on the failure to mitigate point,  
14 one -- I guess going back to my earlier point is, Congress  
15 created the *scienter* element. They've already said how -- how  
16 this should be involved in a False Claims Act case, and they  
17 provided this defense to say: We didn't have the appropriate  
18 state of mind. There's no need to read equitable defenses in.

19 And, two, there's also lengthy case law out there  
20 that, generally speaking, there is no duty for the  
21 United States to mitigate in a fraud case. And that goes  
22 beyond just, you know, some of the other issues we've been  
23 talking about. But duty to mitigate -- right? -- you know, the  
24 United States doesn't have an obligation to stop a party from  
25 defrauding the United States.

1           **THE COURT:** All right.

2           **MR. MOSKOWITZ:** And I would --

3           **THE COURT:** Yeah.

4           **MR. MOSKOWITZ:** And one other thing I'd say is, all of  
5 these failure to mit- -- all of these affirmative defenses --  
6 right? -- under Ninth Circuit case law, they presume that  
7 the United States would have proven the case. So we would have  
8 shown already that they submitted false claims, that they did  
9 so knowingly, that they were material. And would only, at that  
10 point in time, these defenses come into play.

11           And so, again, it's -- to the extent it's part of the  
12 elements, then that's how it -- you know, we should streamline  
13 this case and focus on the elements.

14           Thank you.

15           **THE COURT:** All right. I'll give you the last word,  
16 Mr. Grossman.

17           **MR. GROSSMAN:** Your Honor, I mean, on failure to  
18 mitigate, I would just say that we -- you know, we have  
19 sufficiently pleaded that affirmative defense; and that in  
20 False Claims Act cases, where both False Claims Act claims are  
21 alleged and where common law claims are alleged, courts across  
22 the country have allowed those types of defenses to proceed  
23 past the pleadings and through discovery, where a court can  
24 make a determination at summary judgment on whether those  
25 defenses are viable. And that's what we're asking the Court to

1 do here.

2 **THE COURT:** All right. Thank you, Counsel. I'll take  
3 the matter under submission. Appreciate it. It's very  
4 helpful.

5 **MR. GROSSMAN:** Thank you, Your Honor.

6 **MR. MOSKOWITZ:** Thank you, Your Honor.

7 **MR. BLALACK:** Thank you, Your Honor. Have a good day.

8 **THE COURT:** You too.

9 (Proceedings adjourned at 10:46 a.m.)

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11  
12 **CERTIFICATE OF REPORTER**

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

15  
16 DATE: Wednesday, December 27, 2023

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