

Sealed

FILED by _____ D.C.
OCT 24 2014
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

14-23954

CIV-ALTONAGA

United States of America
ex rel.
Theodore Duay, III,

Plaintiffs,

vs.

FILED UNDER SEAL



Paul B. Tartell

Defendant.

COMPLAINT

1. *Qui tam* Plaintiff Theodore Duay, III ("Duay" or Relator), by and through his attorneys, brings this Complaint on behalf of the United States and on his own behalf, pursuant to 31 U.S.C. § 3730 of the Federal False Claims Act.

2. Under the False Claims Act, a private person may bring an action in any district court for himself and for the United States and may sue the defendant under 3730(b). That private person is known as a relator, and the action is brought as a *qui tam* action.

3. Relator alleges that Defendant submitted, caused to be submitted, or caused to be made fraudulent claims for payment to government health care programs.

I. JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1345.

5. The Court has personal jurisdiction over Defendant because Defendant's principal business and can be found in this district and Defendant committed the acts that violate 31 U.S.C. § 3729, 31 U.S.C. § 3732(a).

Court Name:	SOUTHERN DISTRICT OF FLORIDA
Division:	1
Receipt Number:	FLS100008846
Cashier ID:	jmorgan
Transaction Date:	10/24/2014
Payer Name:	JONATHAN KRONER

CIVIL FILING FEE	
For:	JONATHAN KRONER
Case/Party:	D-FLS-1-14-CV-023954-001
Amount:	\$400.00

CREDIT CARD	
Amt Tendered:	\$400.00

Total Due:	\$400.00
Total Tendered:	\$400.00
Change Amt:	\$0.00

SEALED CASE	
Returned check fee \$53	

Checks and drafts are accepted subject to collection and full credit will only be given when the check or draft has been accepted by the financial institution on which it was drawn.	

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Defendant.

COMPLAINT

1. *Qui tam* Plaintiff Theodore Duay, III (“Duay” or Relator), by and through his attorneys, brings this Complaint on behalf of the United States and on his own behalf, pursuant to 31 U.S.C. § 3730 of the Federal False Claims Act.

2. Under the False Claims Act, a private person may bring an action in federal district court for himself and for the United States and may share in any recovery. 31 U.S.C. § 3730(b). That private person is known as a relator, and the action that the relator brings is called a *qui tam* action.

3. Relator alleges that Defendant submitted, caused to be submitted, false and fraudulent claims for payment to government health care programs.

I. JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 31 U.S.C. § 3732, and 28 U.S.C. § 1345.

5. The Court has personal jurisdiction over Defendant because Defendant transacts business and can be found in this district and Defendant committed acts within this district that violate 31 U.S.C. § 3729. 31 U.S.C. § 3732(a).

6. Venue is proper in this District under 31 U.S.C. § 3732(a) and 28 U.S.C. §1391(b) and (c) because Defendant resides and/or transacts business in this District and has committed acts within this District that violated 31 U.S.C. § 3729.

7. Duay has complied with all procedural requirements of 31 U.S.C. § 3730(b)(2).

II. PARTIES

8. *Qui Tam* Plaintiff Theodore “Ted” Duay, III, is a career healthcare executive. He has been a licensed CPA in Florida for over twenty years, focusing almost exclusively on the healthcare industry.

9. Defendant Paul B. Tartell, M.D. (“Tartell”), NPI 1053342550, operates an otolaryngology practice in Plantation, FL, 33324. Otolaryngology is a medical specialty focusing on the ear, nose, and throat.

10. Dr. Tartell has worked as an otolaryngologist since 1984, both in partnership with another physician and in his own practice.

III. THE LAW

A. The False Claims Act

11. The False Claims Act prohibits the submission of false or fraudulent claims and false statements in order to obtain or keep federal money. It provides, in pertinent part:

- (1) In general.— Subject to paragraph (2), any person who—
 - (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
 - (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

* * *

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3729(a)(1).

12. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461 (notes), and 64

Fed. Reg. 47099, 47103 (1999), the civil penalties were adjusted from \$ 5,500 to \$ 11,000 for violations occurring on or after September 29, 1999.

13. “Upcoding” is committing fraud by knowingly and intentionally submitting a claim under an inappropriate diagnostic or procedural code to obtain a higher rate of reimbursement. Upcoding also occurs by changing the procedure code to a code that pays more money.

IV. THE FRAUDULENT CONDUCT

14. Tartell submits false claims for CPT 31237, Nasal/sinus endoscopy, surgical; with biopsy, polypectomy or debridement (separate procedure) and 31237-50 [hereinafter collectively “31237”].¹

15. Debridement is the removal of unhealthy tissue from a wound to promote healing, by surgical, chemical, mechanical, or autolytic (using the body’s own processes) means.² Vacuum removal of mucous is not debridement.

A. The Scheme

16. Otolaryngologists commonly perform nasal endoscopy (CPT 31231), a diagnostic procedure that allows for visual inspection of patients’ sinuses. This is typically performed in the office using rigid or flexible endoscopes.

17. In 2012, routine diagnostic nasal endoscopy (CPT 31231) was otolaryngologists’ most commonly billed procedure to Medicare.

18. Tartell’s office also conducts diagnostic nasal endoscopies, but frequently bills the government for the more expensive Surgical Nasal Endoscopy with Debridement procedure (CPT 31237 or 31237-50).

19. In 2012, for example, Medicare paid Dr. Tartell on average \$149 for each 31231 inspection procedure and \$420 for each 31237 debridement procedure.

¹ Code 31237 is a unilateral procedure, performed on the right or left sinus. Code 31237-50 is for bilateral debridement, performed on both sides, and pays at 150%.

² <http://www.med.nyu.edu/content?ChunkIID=14803> as of October 12, 2014.

20. The clinical indicators for Endoscopic Nasal Debridement show that is performed almost always *after surgery*. The American Academy of Otolaryngology -- Head and Neck Surgery lists the following clinical indicators for CPT 31237, endoscopic debridement:

1. History (one or more required after failure of mechanical therapy)
 - a) *Postoperative care* of endoscopic sinus surgery
 - b) *Postoperative* hemorrhage
 - c) *Postoperative* exudate or discharge
 - d) Complications of sinus *surgery*
 - e) Fungal sinusitis
 2. Physical Examination
 - a) Complete anterior and posterior nasal examination (rhinoscopy after mucosal decongestion)(one or more required)
 - Significant (early or late) scar formation, particularly in the region of the middle meatus or the frontal recess
 - Significant granulation, persistent crusting, or polypoid tissue, unresponsive to medical therapy
- [Emphasis supplied.]³

21. Duay learned of Tartell's scheme through false claims Tartell submitted to Duay's private insurer for services that were provided to Duay.

1. *Dr. Tartell submitted false claims.*

20. Dr. Tartell improperly billed Duay's insurer for CPT 31237, purportedly performed during four office visits: April 18, 2013; December 12, 2013; March 6, 2014; and June 4, 2014.

21. Duay's medical records for his March 6, 2014 visit state that Tartell's office performed the following procedure: "Bilateral endoscopically debrided mucous and debris."⁴ Contrary to this statement, this was a routine diagnostic nasal endoscopy (CPT 31231) by a physician assistant, not a debridement (31237-50). Tartell's physician assistant did not pull mucous or debris from Duay's nose, nor did the physician assistant perform the procedure bilaterally through both nostrils, but only on Duay's right nostril.

³ <https://www.entnet.org/sites/default/files/Endoscopic-Debridement-CI%20Updated%208-7-14.pdf> as of November 12, 2014.

⁴ Medical "debris," removed by debridement, typically refers to dead, diseased, or damaged tissue and any foreign material that is removed from a wound or other area being treated.

22. Duay's medical records for his June 4, 2014 visit state "Zero degree nasal Endoscopy, after being sprayed with a topical anesthetic/decongestant solution . . . endoscopically debrided inspissated mucous and debris." Physician Assistant (PA) Sharon Cam used a small forceps to lift Duay's nostrils, shine a light, and vacuum a few pieces of mucous from Duay's nostrils using a rigid metal endoscope. Cam did not spray anesthetic or remove any debris (debridement).

23. On April 2, 2014, Duay informed Bradley Harper, a Physician's Assistant in Tartell's office, of the improper claim. Harper said he had had similar concerns in the past and other patients had expressed similar concerns, but Tartell had explained to him that the billing for such procedures (CPT 31237) was correct.

24. On May 9, 2014, Duay informed Vanessa Cordona, an employee in Tartell's billing office, of the improper claims.

25. With Dr. Tartell's consent, Cardona offered to waive Duay's deductible, but would not change or correct the claim. She acknowledged that the procedure described by Duay was diagnostic.

26. Often following endoscopic nasal debridement, otolaryngologists submit the removed tissue for examination by a pathologist.

27. Despite claiming that debridements were performed on Duay, Tartell never sent any tissue purportedly removed for examination by a pathologist.

2. *Tartell Submitted False Claims as Medicare's Top Biller for CPT 31237.*

28. Duay's career as a CPA and healthcare CFO gives him the knowledge, skills and experience to analyze and synthesize medical billing data and Medicare claims data.

29. The Centers for Medicare & Medicaid Services (CMS) disclosed claim data through the "Medicare Provider Utilization and Payment Data: Physician and Other Supplier Public Use File." This data is based on information from CMS's National Claims History Standard Analytic Files for calendar year 2012.⁵

30. Duay conducted an analysis and synthesis of publicly available data made available from various sources, including the above-described CMS file which contains more

⁵ <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/Physician-and-Other-Supplier.html> as of October 10, 2014.

than 9 million records.

31. The results of his analysis and synthesis showed Duay that Tartell not only defrauded Duay’s private insurance company, but that he also defrauded Medicare.

32. In 2012, Tartell collected more reimbursements than any other physician in the nation from Medicare billings of CPT 31237.⁶

33. For Medicare’s fiscal year 2012, Dr. Tartell’s practice differs significantly from all other otolaryngologists reimbursed by Medicare for procedure code 31237.⁷

	<u>Number of Procedures</u>	<u>Average Medicare Payment</u>	<u>Total Payment</u>
National median	32	\$299	\$9,293
National average	45	\$295	\$13,467
Tartell	406	\$420	\$170,538

34. In 2012, 38% of all Medicare reimbursements Tartell received were for billings under the CPT 31237 procedure. In contrast, the CPT 31237 procedure averages only 2% of billings for all other otolaryngologists who perform this procedure.

35. Most otolaryngologists who perform CPT 31237 have a proportionate number of surgeries. This is consistent with the American Academy of Otolaryngology clinical indicators for CPT 31237 that it is a postoperative procedure, except when used for fungal sinusitis.

36. Tartell’s 2012 Medicare practice showed few surgeries.

37. Most otolaryngologists typically send tissue removed by debridement for examination by a pathologist.

38. Tartell’s referral records show few, if any, pathology referrals.

39. Failure to send tissue for examination was a factor in the conviction of an otolaryngologist charged with criminal healthcare fraud for several CPT codes, including CPT 31237, when he had only visually examined patients and suctioned out mucous. *U.S. v. Boesen*, 473 F. Supp.2d 932, 938 (E.D. Ia. 2007) (“very rarely did Defendant ever send any actual tissue for examination by a pathologist.”).

⁶ Tartell performs the second highest number of procedures in the nation among physicians who perform CPT 31237, but his higher reimbursement rate put him at number one.

⁷ Filter on provider type = Otolaryngology and procedure code = 31237, and further excluding otolaryngologists who did not perform the procedure.

40. Dr. Tartell’s other statistics are far from the norm for Medicare-paid otolaryngologists.

	Number # procedures	Medicare Payment	\$ Percent of Practice	National Rank
31237 Nasal/sinus endoscopy surg	406	\$170,538	38%	#1
76536 Us exam of head and neck	390	40,498	8.9%	#2
95027 Id allergy titrate-airborne	8084	36,669	8.1%	#4
95004 Percut allergy skin tests	4885	27,651	6.1%	
95165 Antigen therapy services	2270	24,603	5.4%	85th percentile ⁸
31231 Nasal endoscopy dx	154	22,943	5.1%	
31579 Diagnostic laryngoscopy	200	21,463	4.7%	
99213 Office/outpatient visit est	293	17,137	3.8%	
99204 Office/outpatient visit new	66 ⁹	8,590	1.9%	
92557 Comprehensive hearing test	255	8,309	1.8%	
11000 Debride infected skin	318	8,182	1.8%	
70486 Ct maxillofacial w/o dye	37	7,696	1.7%	
99214 Office/outpatient visit est	85	7,394	1.6%	
95117 Immunotherapy injections	677	6,706	1.5%	
91034 Gastroesophageal reflux test	38	6,213	1.4%	#12

41. National rankings of 1, 2, 4, and 12 could make some sense if this were also one of the nation’s largest otolaryngology practices. But it is not.

42. In 2012, Medicare paid claims to 8,450 otolaryngologists or their practices.

43. One measure of practice size is the number of unique patients. For each of the 8,450 unique NPIs of Medicare-paid otolaryngologists, their procedure with the highest unique beneficiary count averaged 211 and the median was 175.

44. Tartell’s top 3 procedures by unique beneficiary count (rather than number of procedures performed) ranged from 166 to 168.

<u>Code / Description</u>	<u>Unique Beneficiaries</u>
31237 Nasal/sinus endoscopy	168
76536 Us exam of head and	166
92550 Tympanometry & reflex thresh	166

⁸ For the 3,663 providers who received Medicare reimbursement for that procedure in 2012.

⁹ The 66 new patients made him 3,159 of 5013 where provider_type=Otolaryngology and hcpcs_code = 99204 (Office / outpatient visit new). The national average was 71, and the median 48.

45. Ranking his 168 unique beneficiaries compared to all Medicare-paid otolaryngologists, the size of Tartell's practice is below the 211 average and below the 175 median, ranking Dr. Tartell number 4,390 out of 8,450 otolaryngologists—not 1, 2, 4, or even 12.¹⁰

B. Count I: Violations of 31 U.S.C. § 3729(a)(1)(A)

Plaintiff repeats and realleges the paragraphs 1-45 above as if fully set forth herein.

46. Defendant knowingly presented or caused to be presented false or fraudulent claims for payment or approval to Government Health Care Programs, all in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)(A).

47. The United States paid said claims and has sustained damages because of these acts by the Defendant.

C. Count II: Violations of 31 U.S.C. § 3729(a)(1)(B)

Plaintiff repeats and realleges the paragraphs 1-45 above as if fully set forth herein.

48. Defendant knowingly made, used or caused to be made or used false records or statements material to a false or fraudulent claim, all in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)(B).

49. The United States paid said claims and has sustained damages because of these acts by the Defendant.

PRAYER

WHEREFORE, *Qui Tam* Plaintiff Duay, for the United States and for himself, prays as follows:

- A. Against Defendant, treble damages and civil penalties up to the maximum permitted by law,
- B. For the maximum *qui tam* percentage share allowed by law and for attorney's

¹⁰ Relator estimated practice size as follows: for all Medicare-paid otolaryngologists in 2012, Relator sorted first by NPI then for each NPI, sorted by bene_unique_cnt. The highest number of unique beneficiaries for any procedure billed is 2,842, and the minimum is 11. Number one in the nation, Dr. Paley, NPI 1225185465, has a practice that removed ear wax (CPT 69210) from 2,842 unique Medicare beneficiaries in 2012.

fees, costs and reasonable expenses; and

C. For any and all other relief to which Plaintiff may be entitled.

Plaintiff requests trial by jury.

/s/ Jonathan Kroner

FBN 328677

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305 310 6046

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Attorney for *Qui Tam* Plaintiff

This Complaint will **not** be served on Defendant until ordered by the Court.

I HEREBY CERTIFY that the foregoing Complaint has been mailed, postage prepaid, certified mail, this __ day of _____, 2014, to:

- The Honorable Eric H. Holder Jr., Attorney General, United States Department of Justice, c/o Sealed Document Civil Process Clerk, 10th and Constitution, Washington, D.C. 20530;
- Wifredo A. Ferrer, United States Attorney, c/o Sealed Document Civil Process Clerk, 99 NE 4th St, Miami, Florida 33132; and
- Mark Lavine, Assistant United States Attorney, via e-mail only.