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**Decision on Motion for Partial Summary Judgment in *U.S. ex rel. Veltz v. Allegany Rehabilitation Associates Inc.***

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In *United States ex rel. Veltz v. Allegany Rehabilitation Associates Inc.*,<sup>1</sup> relator David Veltz charged that Allegany Rehabilitation Associates Inc. (Allegany), a provider of outpatient mental health rehabilitation services and continuing day treatment programs, submitted fraudulent claims for Medicaid reimbursement and retaliated against Veltz under the False Claims Act (FCA). Allegany moved for partial summary judgment on the reimbursement claims, and the court issued its decision on March 18, 2011, granting the motion in part and denying it in part.

One set of charges involved upcoding for continuing day treatment services. Allegany's electronic billing software automatically replaced correctly entered codes with incorrect ones, causing upcoding (and downcoding), and resulting in overpayment (and underpayment) by Medicaid. Veltz alleged that Allegany continued billing with the software through 1999 despite becoming aware of the upcoding and overpayment problems. A second set of charges involved Allegany's Saturday continuing day treatment program, which was alleged to be plagued by compliance issues, such as inadequate staffing levels, lack of medical necessity, and lack of scheduled therapeutic activity.

The court dismissed the 1994-1995 portion of the software-related claims on the ground that it lacked subject matter jurisdiction under the public disclosure bar. Aside from granting summary judgment to Allegany as to split-billing and post-1999 claims that Veltz withdrew, the court otherwise denied the motion on the ground that genuine issues of material fact precluded summary judgment.

**Grant of Summary Judgment on 1994-1995 Upcoding Claims**

During the time period that Veltz alleged improper bills were submitted to Medicaid, the New York State Department of Health (NYSDH) audited Allegany's activities. This audit resulted in a settlement between Allegany and the state for the period of January 1, 1994 through December 31, 1995. Allegany argued that the settlement foreclosed Veltz's FCA claims for 1994-1995 under the doctrine of accord and satisfaction. The court held that accord and satisfaction did not bar Veltz's FCA claims because Allegany's settlement with the State of New York could only bind those two parties, not the U.S. Attorney General or the U.S. Department of Justice.

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<sup>1</sup> The case is before the United States District Court for the Western District of New York, Docket Number 1:01-CV-00190.

Allegany was more successful in getting a portion of the 1994-1995 claims dismissed under FCA's public disclosure bar. Allegany argued that the court lacked subject matter jurisdiction over the 1994-1995 claims (including those relating to the Saturday continuing day program) because they were publicly disclosed through the audit process. The court agreed that the 1994-1995 allegations were publicly disclosed in the state audit, and that the audit qualified as an enumerated source under FCA as construed by the U.S. Supreme Court's recent decision in *Graham County Soil and Water Conservation Dist. v. United States*.<sup>2</sup> To avoid the public disclosure bar, Veltz therefore had to prove that he had direct and independent knowledge of the basis for his allegations. The court determined that Veltz could establish direct and independent knowledge regarding the Saturday continuing day treatment program claims because he worked at the program from the summer of 1994 through November 1995. Accordingly, the court permitted Veltz to go forward with those claims for the 1994-1995 period. Veltz was not able, however, to establish that he had direct and independent knowledge, and that he therefore qualified as an original source for information supporting upcoding claims caused by the electronic billing software. Accordingly, the court dismissed the 1994-1995 upcoding claims that had been publicly disclosed through the state audit.

On a ground separate from the public disclosure bar, Allegany also sought to dismiss upcoding claims after the 1994-1995 period, but was unsuccessful. Allegany argued that the overpayments attributable to its use of the billing software were caused by inadvertent and innocent mistakes, that it reversed several of the alleged overcharges, and that many of the billing errors resulted in minimal overcharges. As a result, Allegany contended that it was entitled to summary judgment

because Veltz offered no evidence that it intended to deceive Medicaid. The court held that the record contained conflicting evidence on this point, which precluded its ability to grant summary judgment. In particular, the court stated that a question of fact existed as to whether Allegany worked diligently to correct its software problems, or whether, as Veltz contended, it made a business decision not to purchase and install new software.

### **Denial of Summary Judgment on Implied False Certification Claims**

Veltz relied on an implied false certification theory to allege that Allegany submitted false claims because of a failure to comply with NYSDH staffing level regulations. That theory is based on the notion that the submission of a claim for reimbursement itself implies that the defendant has complied with all preconditions to payment. For medical providers, the court held, the implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies expressly states that the provider must comply in order to be paid.

The relevant regulation here requires providers to maintain an adequate and appropriate number of clinical staff members. This requirement is deemed satisfied if one staff member is on site for every ten recipients. While Allegany conceded that it did not meet the 1:10 staffing ratio, it argued that a 1:10 staffing ratio is not necessary to comply with the regulation. Instead, Allegany argued that the 1:10 staffing ratio is merely one way to comply with the regulation. The court agreed with Allegany as to its interpretation of the regulation, holding that the requirement to maintain an adequate and appropriate number of clinical staff can be satisfied in numerous ways. It held, however, that

<sup>2</sup> \_\_ U.S. \_\_, 130 S. Ct. 1396, 1400, n.1, 176 L.Ed.2d 225 (2010).

a determination of what constitutes an adequate and appropriate staffing level is a factual determination that cannot be resolved by a motion for summary judgment.

In sum, the court granted summary judgment to Allegany on the 1994-1995 upcoding claims under the public disclosure bar and the split-billing and post-1999 claims upon their withdrawal by Veltz, but denied summary judgment on the remaining claims because of the existence of genuine issues of material fact.

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