

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:04-CV-400-H

FILED

Jeffrey A. Apperson, Clerk

JAN 14 2010

U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES OF AMERICA,
ex rel. BONNIE SCHAEFER

PLAINTIFFS

V.

CONTI MEDICAL CONCEPTS, INC.,
ANTHONY CONTI, AND
VICTORIA CONTI

DEFENDANTS

JURY INSTRUCTIONS

Members of the Jury, now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions on the law applicable to this case.

It is your duty as jurors to follow the law stated in the instructions, and to apply it to the facts you find from the evidence. Do not single out one instruction alone as stating the law. Rather, consider the instructions as a whole. Do not let the wisdom of any rule of law concern you. You must apply the law in these instructions whether you agree with it or not.

Your primary duty is to determine the facts. In so doing, you must consider only the evidence I have admitted. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls. The statements, objections, and arguments of the lawyers are not evidence. What the lawyers have said is not binding upon you. You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

By telling you to consider the evidence, I do not mean to suggest that you must

necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness and the weight to be given their testimony. You may measure the credibility of any witness by considering their demeanor on the witness-stand, their frankness or lack of it, and their interest in the outcome of the case, if any.

A witness may be discredited or impeached by contradictory evidence or by evidence that the witness said or did something, or failed to say or do something, at some other time, which is inconsistent with the witness' present testimony. If you believe any witness has been impeached, and thus discredited, you may determine the weight, if any, to give such a conclusion.

The rules of evidence permit a witness who by education and experience has become an expert in any art, science, or profession to state an opinion and the reasons for it. You should consider this evidence and give it such weight as you, in the application of your common sense, may think it deserves. If you conclude that the reasons supporting an opinion are not sound or that other credible evidence or expert opinions outweigh the opinion of a particular expert, then you may reject that opinion in whole or in part.

The number of witnesses testifying as to the existence or nonexistence of any fact does not, necessarily, determine the weight of the evidence. The quality and credibility of the evidence is usually more important in your deliberations.

In this case, Plaintiff must persuade you that its claim is more likely true than not. If Plaintiff fails to persuade you on every essential element of its claim, then you should find for Defendant on that claim.

INSTRUCTION NO. 1

The United States claims that from May 25, 1999, through March 31, 2004, each defendant violated the False Claims Act, which prohibits false claims requesting payment from federally-funded healthcare reimbursement programs. Here, the government claims that each time the defendants provided a patient with a System-Loc back brace and billed under code L0565 instead of code L0515 with the L1499 modifier, the defendants knowingly submitted a false bill. To find for the government on this claim, you must find that the government has proven each of the following elements:

- (1) That the defendant presented, caused to be presented, or conspired to present bills for payment or approval of the System-Loc back brace to federally-funded healthcare reimbursement programs;
- (2) That the bills submitted were false; and
- (3) That the defendant acted knowingly in presenting the false bills.

You must consider whether the government has proven each element with respect to each defendant individually.

In addition to showing that the individual defendant actually presented or caused a bill to be presented, the government can establish element number one by showing a conspiracy between Anthony and Victoria Conti. To show a conspiracy, the government must show that Anthony and Victoria Conti had an agreement, or plan, to submit the System-Loc bills under L0565 and, of course, that the other elements are met. An express agreement by Anthony and Victoria Conti is not required and both need not have known all the details of the plan. Rather, the government need only show that both had the general objective to get false claims paid.

With respect to element number two, a claim is false when it is untrue when made. In this case, the government claims that the bills submitted were false because the defendants used the code L0565 for the System-Loc brace instead of the code L0515 with the L1499 modifier. The government contends that the defendants billed the System-Loc brace under code L0565 a total of 766 times. A false claim includes a claim causing the government to pay more than it would have paid had the claim been true.

Under element number three, the law has a special definition of the term "knowingly." The government does not have to prove that the defendant intended to defraud the government. Rather, the government need only show one of the following:

- (a) That the defendant had actual knowledge of the falsity of the bills submitted;
- (b) That the defendant acted in deliberate ignorance of the truth or falsity of the bills submitted; or
- (c) That the defendant acted in reckless disregard of the truth or falsity of the bills.

QUESTION NO. 1: Do you believe that the United States has proven each of the three elements of this first claim? Indicate your answer, either yes or no, for each defendant under Question No. 1 on the Verdict Form. If you answer "yes" with respect to any defendant, indicate the number of false claims that defendant knowingly presented, caused to be presented, or conspired to present. Then proceed to Instruction No. 2.

INSTRUCTION NO. 2

The United States also claims that from May 25, 1999, through March 31, 2004, the defendants violated the False Claims Act by knowingly making false records to obtain payment of false claims by federally-funded healthcare reimbursement programs. Here, the government claims that on fourteen occasions the defendants altered medical records and prescriptions to reflect that a Pro-Fitt brace was provided when, in fact, a System-Loc brace was provided. To find for the government on this claim, you must find that the government has proven each of the following elements:

- (1) That the defendant made, used, or caused to be made or used, a false record;
- (2) That the defendant did so to get the government to reimburse for a Pro-Fitt brace when a System-Loc brace was actually provided; and
- (3) That the defendant acted knowingly.

You must consider whether the government has proven each element with respect to each defendant individually.

The definitions given in Instruction No. 1 apply equally to Instruction No. 2. Thus, to prove that the defendant acted knowingly, the government need only prove one of the three possibilities listed in Instruction No. 1.

QUESTION NO. 2: Do you believe that the United States has proven each of the three elements of this second claim? Indicate your answer, either yes or no, for each defendant under Question No. 2 on the Verdict Form. If you answer "yes" with respect to any defendant, indicate the number of claims for which the defendant knowingly made, used, or caused to be made or used, false records to obtain payment for a Pro-Fitt brace when a System-Loc brace was

actually provided. Then proceed to Instruction No. 3.

INSTRUCTION NO. 3

Next, the United States claims that from May 25, 1999, through March 31, 2004, the defendants violated the federal Anti-Kickback statute. Here, the government claims that the gift of a large screen television violated the statute. To find for the government on this claim, you must find that the government has proven each of the following elements:

- (1) That the defendant gave, or conspired to give, Dr. Ricky Collis the large screen television in return for the referral of patients covered by a federally-funded healthcare program; and
- (2) That, subsequently, the defendant knowingly presented, or caused to be presented, claims to a federally-funded healthcare program for those referred patients.

You must consider whether the government has proven this claim against each defendant individually.

The government can meet the first element of this claim by showing that the defendant was actually responsible for giving the television or that Anthony and Victoria Conti conspired to give the television. To show a conspiracy, the government must show that Anthony and Victoria Conti had an agreement or plan to give Dr. Collis the large screen television in return for the referral of patients covered by a federally-funded healthcare program.

The definition of "knowingly" set forth in Instruction No. 1 applies equally to element number two of this instruction.

QUESTION NO. 3: Do you believe that the United States has proven the two elements of this Anti-Kickback statute claim? Indicate your answer, either yes or no, for each defendant under Question No. 3 on the Verdict Form. If you answer "yes" for any defendant,

indicate the number of claims that defendant presented, or caused to be presented, after giving or conspiring to give Dr. Collis the television in return for referrals. Then proceed to Instruction No. 4.

INSTRUCTION NO. 4

The United States' last claim is a common law claim known as "unjust enrichment." Under this claim, the government alleges that from May 25, 1999, through March 31, 2004, the defendants were unjustly enriched with governmental money that, in good conscience, they should not be allowed to keep. Here, the government claims that the defendants were paid more money than they should have been paid because they billed the System-Loc braces under the code L0565 instead of the code L0515 with an L1499 modifier. To find for the government on this claim, you must find that the government has proven each of the following elements:

- (1) That the government paid the defendant more money than the defendant was entitled to receive; and
- (2) That the defendant's retention of the extra money is unfair to the federally-funded healthcare programs that provided it.

QUESTION NO. 4: Do you believe that the United States has proven each of the two elements of its unjust enrichment claim? Indicate your answer, either yes or no, for each defendant under Question No. 4 on the Verdict Form. If you answered "yes" to Question No. 1 for any defendant, proceed to Instruction No. 5. If you answered "no" to Question No. 1 for all defendants, but "yes" to Question No. 4, proceed to Instruction No. 6. If you answered "no" to Questions No. 1 and 4, sign and date the Verdict Form and return to the courtroom.

INSTRUCTION NO. 5

If you answered "yes" to Question No. 1 for any defendant, you must now determine the amount of the government's damages caused by that defendant's knowing submission of false claims or conspiracy to submit false claims. To calculate those damages, you simply must subtract the amount of money the government would have paid had the bills been submitted truthfully from the amount of money the government did pay because of the false claims.

QUESTION NO. 5: What are the government's damages resulting from each defendant's submission of or conspiracy to submit false claims? Indicate your answer under Question No. 5 on the Verdict Form. If you answered "yes" to Question No. 4, proceed to Instruction No. 6. If you answered "no" to Question No. 4, sign and date the Verdict Form and return to the courtroom.

INSTRUCTION NO. 6

If you answered "yes" to Question No. 4 for any defendant, you must now determine the amount of money that will fairly and reasonably compensate the United States for their damages caused by the defendant's unjust enrichment. To determine these damages, calculate the amount of money the defendant unfairly obtained and withheld from the United States.

QUESTION NO. 6: What are the government's damages based on the defendant's unjust enrichment? Indicate your answer under Question No. 6 on the Verdict Form, then sign and date the Verdict Form and return to the courtroom.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reach an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and even change your opinion, if you become convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room, you will select someone to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in Court. A verdict form has been prepared for your convenience. You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in the Verdict Form with respect to each issue on which you unanimously agree. The foreperson will then date the form and sign it with his or her name and jury number. You will then return to the courtroom with your verdict.

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VERDICT FORM

Question No. 1: False Claims

Conti Medical Concepts:	Yes	_____	Number of Claims: _____
	No	_____	
Anthony Conti:	Yes	_____	Number of Claims: _____
	No	_____	
Victoria Conti:	Yes	_____	Number of Claims: _____
	No	_____	

Question No. 2: False Records or Statements to Get Paid

Conti Medical Concepts:	Yes	_____	Number of Claims: _____
	No	_____	
Anthony Conti:	Yes	_____	Number of Claims: _____
	No	_____	
Victoria Conti:	Yes	_____	Number of Claims: _____
	No	_____	

Question No. 3: Anti-Kickback Statute

Conti Medical Concepts:	Yes	_____	Number of Claims:	_____
	No	_____		
Anthony Conti:	Yes	_____	Number of Claims:	_____
	No	_____		
Victoria Conti:	Yes	_____	Number of Claims:	_____
	No	_____		

Question No. 4: Unjust Enrichment

Conti Medical Concepts, Inc.:	Yes	_____
	No	_____
Anthony Conti:	Yes	_____
	No	_____
Victoria Conti:	Yes	_____
	No	_____

Question No. 5: Damages Cause by Submission of False Claims

Conti Medical Concepts, Inc.:	_____
Anthony Conti:	_____
Victoria Conti:	_____

Question No. 6: Damages from Unjust Enrichment

Conti Medical Concepts, Inc.: _____

Anthony Conti: _____

Victoria Conti: _____

DATE

FOREPERSON
JUROR NO. _____