IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

In this article, IADC member Megan Hargraves discusses a recent False Claims Act case in which the district court, relying solely on Universal Health Services, Inc. v. Escobar, set aside an enormous judgment against a nursing home operator. This article illustrates the ways in which providers may be able to rely upon the government's implementation of previous remedial measures to establish immateriality to its payment analysis in a subsequently-filed FCA action.

$347 Million FCA Judgment Set Aside Under *Escobar's* Materiality Standard

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

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Relying upon the 2016 *Escobar* Supreme Court decision, a federal court in Florida recently overturned a nearly $350 million False Claims Act (FCA) jury verdict against a nursing home operator and related defendants. In doing so, the court expressly cited "an entire absence of evidence of the kind a disinterested observer, fully informed and fairly guided by *Escobar*, would confidently expect on the question of materiality." *United States ex rel. Ruckh v. Salus Rehabilitation, LLC CMC II LLC et al.* ("*Ruckh*"), United States District Court, Middle District of Florida, Case No. 11-cv-1303-T-23TBM (Jan. 11, 2018).

By way of background, the FCA imposes civil liability on any person or entity that "knowingly presents, or causes to be presented" to the U.S. government "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Under the implied certification theory, a person or entity submitting a request for payment impliedly certifies compliance with all applicable laws, regulations, and contract requirements. A violation of any of those laws, regulations, or contract requirements may lead to FCA liability based upon the false certification, even when the government payment decision does not specifically rely on the certification.

In *Universal Health Services, Inc. v. United States ex rel. Escobar,* 136 S.Ct. 1989 (2016), the Supreme Court unanimously upheld the heavily debated theory of "implied certification." However, in doing so, the Supreme Court stressed that the government and relators must continue to satisfy the FCA's "rigorous" materiality and scienter elements. The *Escobar* Court held that implied certification claims are viable where the defendant has made "specific representations about the goods or services provided," and "the defendant's failure to disclose its noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." In the wake of *Escobar*, the lower courts have been left grappling with the two-part test for establishing falsity under an implied certification theory and exactly how to apply the materiality standard.

In a welcomed amplification of the 2016 Supreme Court decision, the district court in *Ruckh* described *Escobar* as "reject[ing] a system of government traps, zaps, and zingers that permits the government to retain the benefit of a substantially conforming good or service but to recover the price entirely—multiplied by three—because of some immaterial contractual or regulatory non-compliance." The court noted that the FCA instead "requires proof that a vendor committed some non-compliance that resulted in a material deviation in the value received and requires proof that the deviation would materially and adversely affect the buyer's willingness to pay."

In *Ruckh*, the relator alleged that a group of nursing home operators engaged in a

scheme to defraud Medicare and Medicaid by (i) failing to maintain a "comprehensive care plan" ostensibly required by a Medicaid regulation, and (ii) submitting deficient paperwork, which the relator claimed showed that defendants never provided the therapy evidenced by the paperwork and billed to Medicare. The jury returned a verdict in favor of the relator in the amount of $115 million. As mandated by the FCA, the trial judge tripled the jury's verdict by entering an order requiring the defendants to pay a total of $347 million.

In post-trial pleadings, however, the court granted the defendants' motion for judgment as a matter of law under Federal Rule of Civil Procedure 50 and vacated the judgment. Noting that materiality was "defined unambiguously and required emphatically by" *Escobar*, the court based its ruling on the relator's failure to offer evidence of materiality. In addition, the court also noted that the relator failed to prove that the defendants submitted claims for payment despite *knowing* that the government would refuse to pay the claims if the government had known about the disputed practices. Thus, the court found that the relator utterly failed both the materiality and scienter requirements of *Escobar.*

Useful to defense practitioners, the court held that it was the relator's burden to show that the government did not know about the recordkeeping deficiency and that, had it known, it would have refused to pay for the goods and services provided. Having failed to discharge that burden, judgment in favor of the defendants was mandated in *Ruckh*. The lynchpin of the court's decision was its finding that the government paid and continued to pay the nursing home operator's claims despite the disputed practices, which were "long ago known to all who cared to know."

While somewhat shocking in its illustration, the result reached in *Ruckh* is, in some ways, a very simple mechanistic application of the Supreme Court's concluding paragraph in the *Escobar* decision. *Escobar* concluded with a paragraph characterized as "rules" to be applied "when evaluating materiality under the False Claims Act." The High Court stated: "[T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." 136 S. Ct. at 2003–04.

The *Ruckh* decision forecasts that the government's lack of enforcement—whether knowing or unknowing—presents a barrier to establishing materiality under the FCA. "Every day that the government continues to pay for a good or service, notwithstanding some known or unknown non-compliance and, consequently, the greater the proposed repayment times three in the event of a successful False Claims Act action, the greater the practical impediment to proof of materiality." The court expounded that a relator's case of materiality would "likely would need to exclude the governments' choosing to resort to a more moderate, more proportional, more efficacious remedy, such as delivery of a 'notice of noncompliance,' accompanied by a stern demand for, and a fair deadline for, compliance." The court went on to explain that the relator's case would also likely need to exclude proof that the government chose "to resort to some mediated solution or to an administrative hearing or to an order to show cause" or "offered a price adjustment" as a means of resolving paperwork deficiencies.

The important takeaway from *Ruckh* is that FCA defendants will be able to rely upon the government's previous implementation of remedial measures to address deficiencies as a basis to establish the absence of materiality in defending against FCA claims related to those same deficiencies.

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