

Applying Escobar's Materiality Standard, Florida Federal Court Reverses \$350 Million False Claims Act Verdict against a Nursing Home Operator

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by Alissa Smith

If the government does not take action and continues to pay for Medicare/Medicaid claims after it learns of non-compliance related to the claims, is the non-compliance material to the government's decision to pay? This is a question being answered in the negative by courts across the country, who have concluded that the government (or a qui tam relator) is not able to proceed under a False Claims Act (FCA) "implied certification" theory if evidence shows that the government did not take action and continued to pay claims after learning of non-compliance with laws associated with those claims. A Florida Federal Court in United States ex. rel. Ruckh v. Salus Rehabilitation, LLC et. al (Case No. 8:11-cv-1303-T-23TBM), is one of the latest to address this issue and find no FCA violation.

Background

In 2016, the United States Supreme Court addressed the issue of whether a claim submission without disclosure of a statute or regulation infraction could potentially trigger a FCA violation in Universal Health Services, Inc. v. United States ex rel. Escobar, spawning a new line of cases that have interpreted the new standards the Court set forth for implied certification FCA cases. Prior to the *Escobar* decision, the circuit courts across the U.S. were split on the issue. In these so-called "implied certification" cases, the government alleged that the party submitting a claim to the government impliedly certified that the services were provided in compliance with laws.

In *Escobar*, the Supreme Court analyzed the reach of the FCA in situations in which a party was alleged to have made a misrepresentation in a payment claim to the federal government because the services provided were, in fact, not in compliance with the law. The Court recognized the implied certification theory, but held, among other things, that under the theory, FCA liability depends on whether the defendant violated a requirement that it knew was material to the government's decision to pay. In providing guidance on how to determine "materiality", the Court noted that, "[t]he materiality standard is

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demanding. The False Claims Act is not ‘an all-purpose antifraud statute’ or a vehicle for punishing garden-variety breaches of contract or regulatory violations.” The Court went on to note: “[I]f 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” and “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.”

Analysis

In light of the guidance in *Escobar*, many courts in analyzing “implied certification” allegations under the FCA, have given significant consideration to evidence about how the government acted following a defendant’s non-compliance disclosure. Courts will make a fact-intensive inquiry into the post-disclosure conduct of the government in order to determine whether a given violation is material to the governments’ payment decision on the related claims. If the government refused to make further payment or took other action against the provider after learning of the non-compliance, that refusal may help the government or a relator to establish that compliance with the particular law at issue was material to the government’s decision to pay. However, if the government continues to pay the claims, and takes no other action, it has proven difficult for the government or a relator to succeed.

A recent example of the uphill battle *Escobar* is presenting for relators and the government in these “implied certification” FCA cases is the *Salus* case. On January 11, 2018, a federal court in Florida followed a line of post-*Escobar* cases, denying an implied certification theory case under the FCA based on evidence that the government continued to pay claims related to the subject matter of the relator’s complaint, even after the government learned about the non-compliance. In *Salus*, a nurse relator alleged FCA violations against the owners and operators of 53 specialized nursing facilities based on the nursing facility’s alleged failure to maintain a comprehensive care plan for residents required under Medicaid, as well as defects in paperwork required to support claims to the Medicare program, such as unsigned or undated documents.

The judge in *Salus* vacated a \$350 million verdict against Salus Rehabilitation, which had been entered less than a year earlier (on March 1, 2017), because the evidence in the case showed that the government knew about the non-compliance, and did nothing about it. In overturning the prior verdict against the nursing homes, the court stated, “[n]ot only did the relator fail to prove that the governments regarded the disputed practices as material and would have refused to pay, but the relator failed to prove that the defendants submitted claims for payment despite the defendants’ knowing that the governments would refuse to pay the claims if either or both governments had known about the disputed practices. In fact, both governments were—and are—aware of the defendants’ disputed practices, aware of this action, aware of the allegations, aware of the evidence, and aware of the judgements for the relator—but neither government has ceased to pay or even threatened to stop paying the defendants for the services

provided to patients throughout Florida continuously since long before this action began in 2011.” The judge noted that the government had never made any complaint or imposed any administrative sanction on the practices alleged by the relator. The judge further wrote, “federal and state governments regard the disputed practices with leniency or tolerance or indifference, or perhaps with resignation to the colossal difficulty of precise, pervasive, ponderous and permanent record-keeping in the pertinent clinical environment.”

The *Salus* decision is another win for health care providers who have long lived in fear of the enormous penalties under the FCA whenever non-compliance is discovered with the highly complex, technical and ever-changing health care regulations. While each case applying the materiality standard must be analyzed on its particular facts and circumstances at issue, the post-*Escobar* cases analyzing the materiality standard have provided a welcomed, more consistent approach that providers can look to when defending these cases.