11th Circ. FCA Ruling Takes Practical Approach To Materiality

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On June 25, in Ruckh v. Salus Rehabilitation LLC,[1] the U.S. Court of Appeals for the Eleventh Circuit restored a jury's verdict under the False Claims Act.

At trial, the plaintiff persuaded the jury that the defendants had defrauded Medicare for years by misrepresenting the level of services they provided. U.S. District Judge Steven Merryday of the U.S. District Court for the Middle District of Florida, however, overturned the verdict and granted judgment to the defendants.

In reinstating the verdict, the Eleventh Circuit rejected the district court's view that the defendants' billing practices were mere record-keeping deficiencies[2] and not material for purposes of the False Claims Act. As discussed below, the Eleventh Circuit eschewed a cramped reading of materiality and instead adopted a holistic, commonsense approach.

Escobar and Materiality Under the False Claims Act

The FCA is the federal government's primary tool for combating fraud.[3] The FCA gives the government a cause of action against anyone who makes false or fraudulent demands for money or makes or uses false or fraudulent statements.

A key feature of the law is the qui tam or whistleblower provision. This allows private citizens, called relators, to sue on behalf of the government and receive a portion of the recovery.

In order to understand the Eleventh Circuit's decision in Ruckh, one first needs to be familiar with the 2016 U.S. Supreme Court decision, Universal Health Services Inc. v. U.S. ex rel. Escobar.[4]

In Escobar, the Supreme Court explained that claims submitted with implied false statements — such as "the level of treatment provided was appropriate for this patient" — are actionable under the FCA.[5] The court then turned its attention to the materiality requirement, a key element for FCA liability. The court focused on whether disclosure of the information would have influenced the government's decision to pay the claim.[6]

In dicta, the Supreme Court identified some factors that lower courts could consider in evaluating materiality.[7] One such factor was whether the government pays claims despite knowing that certain requirements underlying the claim were violated. The court opined that continuing payment in those circumstances "is very strong evidence that those requirements were not material."[8]

When Escobar was remanded, the U.S. Court of Appeals for the First Circuit noted that the Supreme Court required a holistic analysis of materiality.[9] It held that the fundamental inquiry in analyzing materiality is "whether a piece of information is sufficiently important to influence the behavior of the recipient."[10] Applying that standard, the First Circuit "[had]

little difficulty" finding that the violations alleged in Escobar were material.[11]

Following the Supreme Court's decision in Escobar, defendants frequently have argued that qui tam relators or the government cannot prove materiality. Often, they rely on the Supreme Court's dicta to claim that lack of evidence that the government has denied payment in identical circumstances is an insurmountable obstacle to liability.

The Eleventh Circuit's recent decision in Ruckh is the latest example of a court grappling with this issue in the aftermath of Escobar.

District Court Vacates Jury's Verdict for Relator

In 2011, the relator Angela Ruckh filed a qui tam suit against five defendants. The defendants included two skilled nursing facilities, or SNFs, two organizations that provided management services and another company that provided rehabilitation services. Ruckh, a registered nurse, alleged that the defendants violated the FCA in three ways.

First, they routinely upcoded when billing for services. Specifically, Ruckh asserted that the defendants upcoded resource utilization group levels by inflating the amount of therapy and nursing services that residents received. Because higher resource utilization group codes result in higher reimbursements, this practice fraudulently inflated Medicare payments.

Second, the defendants engaged in ramping. Ramping occurs when a facility impermissibly schedules more extensive services to coincide with the assessment period that Medicare uses to set its reimbursement levels. Increasing services to a patient during the assessment period thus increases what Medicare pays the facility for that patient.

Third, the defendants submitted claims to Medicaid for reimbursement without comprehensive care plans. Based on federal law and Florida administrative law, SNFs must create and keep documentation for a plan of care for each patient.

After the U.S. and the state of Florida declined to intervene, the relator continued to pursue the case and litigated it through trial. In February 2017, after a month-long trial, the jury found the defendants liable for the submission of 420 fraudulent Medicare claims and 26 fraudulent Medicaid claims, and awarded over $115 million in damages.

After trebling the damages and imposing statutory penalties, the district court entered judgment against the defendants for over $347 million.[12]

Later, however, the district court granted the defendants' motion for judgment notwithstanding the verdict. In doing so, the court relied primarily on its assessment that the relator had failed to meet Escobar's demanding materiality standard at trial.

In particular, it held that "the relator failed to offer competent evidence that the defendants knew that the governments regarded the disputed practices as material and would have refused to pay the claims" had they known about those practices.[13]

The Eleventh Circuit's Application of Escobar

On appeal, the Eleventh Circuit rejected the defendants' attempt to characterize the upcoding in the claims as mere paperwork defects.[14] The court noted that, "[a]t its core, the concept of upcoding is a simple and direct theory of fraud."[15] It concluded that a jury reasonably could have and did find these misrepresentations to be material because

Medicaid paid the SNFs more than they were owed.

The issue of upcoding went to "heart of the SNF's ability to obtain reimbursement from Medicare."[16] As such, the false representations about the level of care provided necessarily influenced the government's payment decision.

Likewise, the court found that the ramping fraud was material. The defendants "artificially and impermissibly inflated the level of services they provided" and caused Medicare to pay more than it owed.[17] Because this misconduct directly affected the payment Medicare made to the SNFs, it was material.[18]

The appeals court did, however, uphold the district court's ruling that the relator failed to prove materiality on her Medicaid fraud claims. Although comprehensive care plans are required by law, the relator did not introduce any evidence that the state declined to pay claims upon learning that the SNFs had failed to meet that requirement.[19] In fact, evidence at trial showed the opposite; when the SNF defendants' deficient care plans were reported to the state, Medicaid did not refuse reimbursement for services or seek to recoup past payments.

In addition, the relator failed to show that the defendants' noncompliance with care plan requirements resulted in misleading representations to Medicaid in requesting payment. Applying Escobar, the court found that the defendants' failure to comply with comprehensive care plan requirements, without more, was not material.[20]

Importance of the Decision

The Ruckh decision is a welcome, commonsense application of Escobar's materiality guidance. The defendants' practices of upcoding and ramping directly affected Medicare payments. Materiality in these circumstances is obvious — the defendants' misrepresentations caused Medicare to pay more than it should have.

If the Eleventh Circuit had upheld the district court's decision, straightforward fraud cases would have become much more difficult to pursue under the False Claims Act. Fortunately, the court rejected the defendants' arguments and avoided that disastrous result.

The court did affirm dismissal of the relator's Medicaid claims premised on noncompliance with care plan requirements. That conclusion, however, was based on two specific reasons. First, there was actual evidence that the state was willing to continue paying after learning of the defendants' noncompliance. Second, there was no evidence that the care plan violations led to misleading representations when the defendants submitted the Medicaid claims.

Ruckh is a clear win for the government and the relator. The Eleventh Circuit reinstated a jury verdict for over $85 million in damages. After trebling and statutory penalties, the resulting judgment is for over $255 million. That judgment is awarded to the U.S. and benefits taxpayers. The relator, for her actions in bringing the case, is entitled to a percentage of that award plus attorneys fees and costs.

In a greater sense, Ruckh is a win for the government's efforts to root out fraud. The defendants had hoped that Ruckh would provide them with ammunition to deny liability even in obvious fraud situations.

The Ruckh court's insistence that materiality must be viewed with common sense and

experience echoes the Supreme Court's view in Escobar. In that case, the Supreme Court rejected strict pleading labels and categories of falsity in favor of a holistic assessment of whether there is a material fraud.

The Eleventh Circuit likewise rejected the district court's reduction of upcoding and ramping violations to mere paperwork issues and instead restored the jury's well-founded verdict. This commonsense approach will benefit whistleblowers, government attorneys and taxpayers in the fight against fraud.

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[1] Ruckh v. Salus Rehabilitation LLC, No. 18-10500 (11th Cir. June 25, 2020).

[2] United States v. Salus Rehabilitation LLC, 304 F.Supp.3d 1258, 1264 (M.D. Fl. 2018).

[3] https://www.whistleblowerllc.com/resources/whistleblower-laws/the-federal-false-claims-act/.

[4] Universal Health Services Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016).

[5] Id. at 1999.

[6] Id. at 2004; see also id. at 2002-03 ("materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation'"). The FCA similarly defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money of property." 31 U.S.C. §3729(b)(4).

[7] Id. at 2003.

[8] Id. at 2003.

[9] United States ex rel. Escobar v. Universal Health Services Inc., 842 F.3d 103, 109 (1st Cir. 2016).

[10] Id. at 110.

[11] Id. at 110. The fraud in Escobar involved a facility submitting claims for mental health services furnished by unlicensed providers. The court cited three reasons for its conclusion. First, compliance with the licensing requirements at issue was a condition of payment. Second, the licensing regime was "central to the state's Medicaid program and thus material to the government's payment decision." Third, there was no evidence that the state agency responsible for paying the claims knew that the defendant was not complying with the requirements. Id. at 110-12.

[12] http://whistleblowerllc.com/false-claims-act-penalties/.

[13] See Ruckh, No. 18-10500, slip op. at 13.

[14] Id. at 28.

[15] Id. at 29.

[16] Id. at 29.

[17] Id. at 31.

[18] Id. at 30.

[19] Id. at 37.

[20] Id. at 37-39.