Circulating Opinion

Vol. 2 No. 1 March 2, 2018

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

United States of America and State of Florida *ex rel.* Angela Ruckh,

Plaintiffs,

v.

Salus Rehabilitation, LLC, et al.

Defendants.

No. 8:11-cv-1303-T-23TBM

U.S. District Court for the Middle District of Florida, Tampa Division

Introduction:

On January 11, 2018, the federal district court granted Salus Rehabilitation's motions for judgment as a matter of law and for a new trial after a jury awarded the plaintiffs $347 million in damages for defendants' False Claims Act (FCA) violations. The court held that the plaintiffs offered no evidence that the government regarded the defendants' alleged Medicare and Medicaid non-compliance as material to its payment for contracted services. Judge Merryday conducted his materiality analysis with the precision and rigor Justice Thomas called for in the U.S. Supreme Court's *Universal Health Services, Inc. v. United States ex rel. Escobar*.

Opinion Digest:

The Federal False Claims Act and the Florida False Claims Act permit the federal government and the state government, respectively, acting through a relator, to recover damages for a material and knowing misrepresentation to the government about a product or service sold to the government. Rather than claim that the defendants—the owners and operators of fifty-three specialized nursing facilities—billed the government for unnecessary, inadequate, or incompetent service, the relator asserts that the failure to maintain a "comprehensive care plan," ostensibly required by a Medicaid regulation, renders fraudulent the defendants' Medicaid claims. Also, the relator asserts that a handful of paperwork defects (for example, unsigned or undated documents) compel the decisive inference that the defendants never provided the therapy evidenced by the paperwork and billed to Medicare. ***

But the relator offered no meaningful and competent proof that the federal or the state government, if either or both had known of the disputed practices (assuming that either or both did not know), would have regarded the disputed practices as material to each government's decision to pay the defendants and, consequently, that each government would have refused to pay the defendants. *** [T]he 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

---

Judge Steven D. Merryday was confirmed to the Middle District of Florida on February 6, 1992. He currently serves as the district's Chief Judge. Judge Merryday had no role in WLF's selecting or editing this opinion for our Circulating Opinion feature. The full opinion is at http://www.wlf.org/upload/misc/Ruckh-opinion-re-Escobar-280040198229.pdf.

allegations, aware of the evidence, and aware of the judgments 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. For these and for each of the other reasons argued by the defendants, the judgments cannot stand.

THE MATERIALITY AND SCIENTER DEFECT

*** The defendants argue persuasively that the relator failed to offer evidence of materiality, defined unambiguously and required emphatically by *Universal Health Services, Inc. v. [United States ex rel.] Escobar,* 136 S. Ct. 1989 (2016). In fact, the evidence and the history of this action establish that the 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 evidence shows not a single threat of non-payment, not a single complaint or demand, and not a single resort to an administrative remedy or other sanction for the same practices that result in the enormous verdict at issue. ***

Also, the defendants argue persuasively that the relator failed to offer competent evidence that the defendants knew that the governments regarded the disputed practices as material but, despite the defendants' guilty knowledge, the defendants requested money from the governments. Of course, with no evidence that the governments regarded the disputed practices as material, establishing the defendants' knowledge of materiality seems at least impractical, if not impossible (after all, until one proves, say, that the moon is green cheese, one cannot prove that someone else knows that the moon is green cheese).

*** *Escobar* overtly undertakes "to clarify some of the circumstances in which the False Claims Act imposes liability" for "implied false certification." 136 S. Ct. at 1995. Writing for the unanimous court in *Escobar,* Justice Thomas at the outset explicitly confirms that "implied false certification theory can be a basis for liability" (1) if a claim for payment "makes specific representations about the goods or services provided"; (2) if the defendant "knowingly fails to disclose the defendant's non-compliance with a statutory, regulatory, or contractual requirement"; and (3) if the "omission renders those representations misleading." 136 S. Ct. at 1995. *Escobar* concludes that the False Claims Act transforms the defendant's material and knowing "omission"—the "failure to disclose" the non-compliance—into a compensable misrepresentation for which a relator can maintain an action. Conversely, *Escobar* necessarily means that if a service is non-compliant with a statute, a rule, or a contract; if the non-compliance is disclosed to, or discovered by, the United States; and if the United States pays notwithstanding the disclosed or discovered non-compliance, the False Claims Act provides a relator no claim for "implied false certification." ***

Also at the outset, Justice Thomas pointedly emphasizes *Escobar*'s holding that liability for "implied false certification" depends not on the government's label—"condition of payment" or "condition of participation" or the like—but that "to be actionable under the False Claims Act" a "misrepresentation about compliance . . . must be material to the Government's decision to pay." *** 136 S. Ct. at 1996. ***

Escobar expounds further the attributes of the required materiality. *** First, *Escobar* rejects any notion that "materiality" requires the violation of an express condition of payment or the violation of some other "express signal" from the buyer about "the importance of the qualifying information." 136 S. Ct. at 2001. Next, *Escobar* explains that a misrepresentation subjects a defendant to liability under the False Claims Act only if "material to the other party's course of action." 136 S. Ct. at 2001. Also, *Escobar* confirms that a supplier is not entitled to "deliberate ignorance" of, or to "reckless disregard" of, the materiality of a representation about the goods or services; the law imputes to a vendor the knowledge of a reasonable person situated as the vendor is situated.

Escobar illustrates the latter principle with an instructive example:

> If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has "actual knowledge." Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information" even if the Government did not spell this out.

136 S. Ct. at 2001-02. *Escobar*'s defective gun example is informative. *** [T]he defect is so fundamental and the consequence of the defect is so readily perceptible that the law imputes to the seller knowledge of the materiality of the defect. No reasonable government purchases for a soldier a gun that won't shoot, and no reasonable seller of guns thinks otherwise.

Escobar concludes by prescribing how the "materiality requirement should be enforced." 136 S. Ct. at 2002. *** *Escobar* specifies that a "rigorous" and "demanding" standard for materiality and scienter precludes a False Claims Act claim based on a "minor or unsubstantial" or a "garden-variety" breach of contract or regulatory violation. 136 S. Ct. at 2003. Instead, *Escobar* assumes and enforces a course of dealing between the government and a supplier of goods or services that rests comfortably on proven and successful principles of exchange—fair value given for fair value received. *Escobar* rejects 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. A principal mechanism to ensure fairness and to avoid traps, zaps, and zingers is a rigorous standard of materiality and scienter. For this reason (among others), as *Escobar* emphasizes, the government's payment to a vendor despite knowledge of a defect "very strongly" evidences the defect's immateriality. 136 S. Ct. at 2003.

Escobar reinforces this understanding of the False Claims Act by acknowledging the "essentially punitive" effects of the False Claims Act's remedial mechanism: treble damages plus a civil penalty "of up to $10,000 per false claim." 136 S. Ct. at 1996. *** At an irreducible and necessary minimum, the "essentially punitive" False Claims Act 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.

Escobar concludes with a paragraph characterized as "rules"—not characterized as advice or as recommendations but as "rules"—to apply "when evaluating materiality under the False Claims Act":

> [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.

*** Much about the evidence in the present action *** attests to the relator's inability to meet the "rigorous and demanding" standard of *Escobar.* The record fatally wants for evidence of materiality and scienter;

ISBN 1056 3059

the evidence that exists gravitates contrary to materiality and scienter. The defendants delivered the services for which the governments were billed; the governments paid and continue to pay to this day despite the disputed practices, long ago known to all who cared to know.

The record suffers 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: evidence of how government has behaved in comparable circumstances. For example, one might expect evidence of whether record-keeping deficiencies have resulted in the sudden and indefinite discontinuation of payment to providers of health care services to elderly, disabled, dependent, and other especially vulnerable patients [or] evidence of whether, when, and to what extent, especially in dealing with a large organization that serves thousands of acute-care patients, an administrative remedy, rather than a sudden and unexpected refusal to pay, is required or preferred to address administrative non-compliance, including a record-keeping deficiency. ***

In the present action, the relator's burden was to show that the federal government and the state government did not know about the record-keeping deficiency but, had the governments known, the governments would have refused to pay the operators of fifty-three specialized nursing facilities for services rendered, products delivered, and costs incurred. *** The record is effectively barren of evidence on how the governments might have addressed the disputed practices and, as the parties were notified timely by the trial judge, the dearth of evidence left the jurors to guess. The resulting verdict *** cannot stand. The judgments effect an unwarranted, unjustified, unconscionable, and probably unconstitutional forfeiture—times three—sufficient in proportion and irrationality to deter any prudent business from providing services and products to a government armed with the untethered and hair-trigger artillery of a False Claims Act invoked by a heavily invested relator.

*** [T]he controlling question is not whether on a small scale—a patient or a few patients or a facility or even a few facilities or one physician, one therapy, or one pharmaceutical—but whether on a large scale, on the scale of a major statewide provider of a scarce health care resource in a large and potent state, the federal government or the state government would refuse to pay the provider because of a dispute about the method or accuracy of payment after the government has permitted a practice to remain in place for years without complaint or inquiry. Or, on the other hand, would the government have insisted on a new *modus operandi* for the future? ***

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. Why? If a non-compliance is found quickly and remains small, the government might likely demand perfect performance and full accounting. If a non-compliance is larger and lingers longer and the repayment times three becomes a burden that threatens the vitality of the vendor and threatens the public interest, the government might not demand repayment times three. ***

CONCLUSION

*** [C]ertainly the government that continues to pay full fare for a product or service despite knowledge of some disputed practice, some non-compliance, or some other claimed defect, relentlessly works itself into a steadily tightening bind that at some point becomes disabling because the government (or the relator, who sues in the government's stead) must prove that had the government known the facts the government would have refused to pay. In other words, at some point, this burden, growing incrementally more formidable each day, presents to the government the insurmountable burden of proving that the government would not do exactly what history demonstrates the government in fact did (and continues to do until this moment). In this action, I find the relator's claims fatally ensnared in that intractable bind.

  ISBN 1056 3059