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Eleventh Circuit restores most of multimillion dollar verdict in favor of *qui tam* relator backed by litigation funder

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Overview

On June 25, 2020, the United States Court of Appeals for the Eleventh Circuit reversed one of the most noted False Claims Act (FCA) decisions to have been handed down in a decade and reinstated most of a 2017 jury verdict holding owners and operators of skilled nursing facilities liable for damages and penalties under the FCA. While applying the same "rigorous" post-*Escobar* materiality and knowledge standards that led the trial judge to find the trial record showed "an entire absence of evidence" of materiality, the appellate court found that "plain and obvious" evidence of materiality supported a verdict of $85 million in single damages for Medicare fraud. But in affirming the trial court's rejection of the jury's verdict finding fraud on the Florida Medicaid program, the panel also showed that *Escobar* materiality can meaningfully limit the reach of the FCA in the right circumstances.

Background

In 2011, Relator Angela Ruckh filed a *qui tam* complaint against five defendants who provided and managed the provision of skilled nursing facility services in Florida. Ruckh alleged that the defendants engaged in "upcoding" claims for covered Medicare services by artificially inflating Resource Utilization Group codes to get higher Minimum Data Set assessment scores, and engaged in the "ramping" of treatment – artificially timing services to coincide with Medicare's regularly scheduled assessment periods to maximize forward-looking reimbursement levels. Both practices, she alleged, had the effect of increasing Medicare reimbursement for the services. She also contended that defendants had failed to prepare and maintain comprehensive care plans for Medicaid patients resident in their facilities. A jury in the U.S. District Court for the Middle District of Florida returned a verdict for the relator, awarding $115 million in single damages. The district court entered a judgment in favor of the relator, the United States, and the State of Florida for nearly $348 million after trebling and the imposition of penalties. Following entry of judgment, the defendants renewed a pending motion for judgment as a matter of law, challenging the findings of both Medicare and Medicaid fraud for lack of materiality.

Trial court opinion

In January 2018, the district court reversed course, delivering a forceful repudiation of the jury verdict and the relators' evidence, holding that the relator had "offered no meaningful and competent proof" that the "governments regarded the disputed practices as material and would have refused to pay."[1] The court relied heavily on the rigorous and demanding nature of the materiality standard articulated by the Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct.

[1] *United States v. Salus Rehab., LLC*, 304 F. Supp. 3d 1258 (M.D. Fla. 2018).

1989 (2016), and in particular what it described as the Supreme Court's "rules" to apply when evaluating materiality under the FCA: if the government "pays a particular claim in full despite its actual knowledge that certain requirements were violated," or "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. The trial court juxtaposed what it characterized as a "fatally deficient" and "effectively barren" record of proof that the government would deny payment in comparable circumstances with the essentially punitive nature of the remedy of "complete disgorgement times three" plus penalties. The trial court relied heavily on proof of the government's inaction, concluding that the evidence "show[ed] 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[ed] in the enormous verdict at issue." In the trial court's view: "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 trial court also concluded that the scope and duration of the conduct should be taken into account: the longer the alleged fraud lasts, and the greater the potential liability, the greater the burden is on the government to establish materiality under the False Claims Act.

The district court granted defendants' renewed motion for judgment as a matter of law, and Ruckh appealed.

11th Circuit opinion

The Eleventh Circuit departed entirely from the trial court's analysis of the alleged fraud on the Medicare program.[2] The Eleventh Circuit held that upcoding is a "simple and direct theory of fraud" under which the defendants represented that they had provided more services—in quantity and quality—than they, in fact, provided. As a result, Medicare paid the defendants higher amounts than they were truly owed. This evidenced a "plain and obvious" materiality that "went to the heart of the [defendants'] ability to obtain reimbursement from Medicare."

The court found that "ramping" of care also presented a "fairly straightforward case." By artificially timing services to coincide with Medicare's regularly scheduled assessment periods, the defendants caused Medicare to reimburse at a higher level than it would if the defendants had reported the appropriate level of services. Like upcoding, ramping is material, "as it goes to the essence of the parties' economic relationship." The court restored the $85 million Medicare fraud verdict, with instructions that the trial court impose treble damages and penalties on that amount.

However, the Eleventh Circuit affirmed the district court's ruling on the Medicaid claims, holding that no jury could reasonably conclude that the defendants defrauded the Florida Medicaid program merely because they failed to prepare and maintain comprehensive care plans. Although Florida's Medicaid regulations require skilled nursing facilities to provide services in accordance with a written plan of care, and a Medicaid coverage handbook put providers on notice that Medicaid payments for services that lack required documentation will be recouped, the proof did not meet the demanding materiality standard set by *Escobar*. The court found no evidence that the state ever declined payment for or otherwise enforced such violations, which was strong evidence against a finding of materiality.

Impact

The Eleventh Circuit opinion in *Ruckh* draws a sharp contrast between the type of "affirmative misrepresentations" involved in upcoding and ramping, which directly affect the payments that

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[2] *Ruckh v. Salus Rehab.*, LLC, 18-10500, 2020 WL 3467393 (11th Cir. June 25, 2020).

Medicare makes to skilled nursing facilities, and the recordkeeping deficiencies involved in failing to prepare and maintain plans of care for Florida Medicaid patients. The relator presented no evidence that the State of Florida ever declined payment, recouped for, or otherwise enforced, these types of violations. That, under *Escobar*, fails the materiality test. On the other hand, the holding that upcoding and ramping are "direct" and "straightforward" theories of a material fraud on the Medicare program leaves little room for interpretation in factually similar cases.

The decision also walks back a trial court interpretation of the Supreme Court's materiality standard that relied almost entirely on the government's pattern of continuing to pay claims despite knowledge of the defendants' alleged fraudulent conduct. In contrast to the trial court, the Eleventh Circuit held that the record of government inaction in response to the defendant's alleged misconduct was not enough to overcome evidence that billing records were manipulated in a manner that fundamentally affected the amount of Medicare reimbursement. Notably, the Eleventh Circuit did not hold that evidence of government inaction is never relevant to materiality, but that in this case, the jury could instead reasonably have relied on the "obvious" nexus between false records and payment to reach a verdict in favor of relator.

Litigation funding did not bar appeal

One other feature of the appellate opinion is worth noting. The Eleventh Circuit considered and rejected defendants' motion to dismiss the appeal, which contended that Ruckh's participation in a litigation funding agreement vitiated her standing to prosecute the appeal. The court concluded that despite Ruckh's exchange of a small share of her potential recovery (less than 4%) for litigation financing, she retained a sufficient interest in the case to pursue the appeal. The court noted that although the statute does not expressly authorize relators to reassign their right to represent the interests of the United States in *qui tam* actions, it was not persuaded that the Act proscribes such an assignment. Given the impact that these arrangements could have on high-stakes FCA litigation, the Eleventh Circuit's decision is not likely to be the last work on the subject.

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