LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

WEDNESDAY, NOVEMBER 11, 2020

PERSPECTIVE

FCA update: Will the Supreme Court address materiality (again)?

By James L. Zelenay, Jr. and Jeremy S. Smith

Writing for a unanimous Supreme Court in 2016 in the landmark case *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), Justice Clarence Thomas explained that the False Claims Act's "materiality requirement" — one of the key elements of any False Claims Act case brought by whistleblowers or the government claiming "fraud" on the government — is "demanding" and "rigorous." The court then gave specific examples of what would and would not meet that standard:

"[P]roof 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 non-compliance with the particular statutory, regulatory, or contractual requirement [alleged to have been violated by the recipient of government funds]. 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."

Since *Escobar*, lower federal courts have differed on how to apply this guidance to specific cases. For instance, is the government's decision not to intervene in a False Claims Act case relevant to the analysis? How should government inaction following public disclosure of allegations of wrongdoing be viewed? These, and other questions, have led to numerous petitions for certiorari requesting clarification from the court, all of which the court has denied. The most recent of these came in a petition filed by the relator in *United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533 (10th Cir. 2020) — for which the court denied certiorari last month. 20-286 (U.S. Oct. 5, 2020).

In that case, the 10th U.S. Circuit Court of Appeals had held that the district court properly granted summary judgment for the defendant based on lack of materiality. The relator had contended that the defendant hospital had committed fraud by allegedly falsifying patient arrival times and falsely certifying compliance with the requirement that its employee handbooks have a specific discussion of the False Claims Act. As to the former allegation, the 10th Circuit recognized that the arrival times were a factor in the Medicare reimbursement amounts the Centers for Medicare and Medicaid, also called the CMS, paid for cardiac services. But that did not satisfy the False Claims Act's materiality requirement, because: (1) CMS had investigated the hospital and although it may not have had "'actual knowledge' of the alleged infractions," CMS had received detailed allegations and did nothing in response; (2) the allegedly falsified arrival times were just "a subset of a subset of the data reported" to CMS; (3) there was no evidence of a cover-up; and (4) even assuming accurate reporting is formally identified as a condition precedent to funding, such is insufficient to show materiality under *Escobar*. With respect to the alleged failure of the manual to include the requisite discussion of the False Claims Act, the 10th Circuit bluntly explained that the False Claims Act "is not a tool to police everyday regulatory compliance."

While the court denied certification in *Janssen*, the 11th Circuit's decision just a few months later in *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020) shows how lower courts have interpreted materiality differently and why some have been pressing the Supreme Court for further guidance. There, the relator alleged that two nursing homes were representing to Medicare that they were providing more therapy minutes and more extensive services to patients than the medical records reflected. Even though the allegedly inflated therapy minutes and service codes were also "subsets of subsets of data" that affected how much the government paid the nursing home, the 11th Circuit concluded it is "plain and obvious" the alleged inflation was material because it affected the amount paid to the nursing homes. The 11th Circuit did not consider any evidence (or the lack thereof) regarding whether the government withheld or did not withhold payment when it learned of similar allegations of inflated therapy minutes and service codes, nor any of the other types of evidence the 10th Circuit found decisive in *Janssen*.

Is the government's decision not to intervene in a False Claims Act case relevant to the analysis? How should government inaction following public disclosure of allegations of wrongdoing be viewed?

Meanwhile, in the 9th Circuit, members of the same panel deciding *United States ex rel. Rose v. Stephens Institute*, 909 F.3d 1012 (9th Cir. 2018) disagreed on the governing standard for materiality. According to the majority, *Escobar* was merely "'gloss' on the analysis of materiality" and reaffirmed the 9th Circuit's previous analysis that focused on how the statutory and regulatory scheme conditioned payment on compliance. Judge N. Randy Smith dissented, arguing that "caring is not enough to make it material under the *Escobar* standard." What Judge Smith argued was needed, and was missing from the record in the *Rose* case, was evidence "about what the government would actually do in this case (or even in a similar case)." This reasoning aligns with the 10th Circuit's decision in *Janssen*. The Supreme Court denied certification in *Rose* too.

The lower courts clearly have differences in how to apply materiality in False Claims Act cases following *Escobar*. It seems inevitable the Supreme Court will eventually need to weigh in. But apparently it will take at least another court term. ■

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