

CLIENT ALERT

Escobar Erases \$350M FCA Verdict Against Nursing Home Co.

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The *Escobar* materiality standard has once again proven an insurmountable hurdle for relators under the False Claims Act (FCA). For the second time in a matter of months, a court has thrown out an FCA jury verdict for hundreds of millions of dollars based upon the *Escobar* requirement that evidence must show that the defendant knew that the noncompliance at issue was material to the government's payment decision.

On January 11, 2018, Judge Steven Merryday of the U.S. District Court for the Middle District of Florida vacated a jury verdict of \$347 million against the owners and operators of fifty-three nursing facilities. The defendants in *U.S. ex rel. Ruckh v. CMC II, LLC et al.* were accused of failing to properly maintain "comprehensive care plans" and other required paperwork. After a four-week trial, the jury returned a verdict finding that the defendants submitted false claims totaling \$115 million to the government. That figure was subsequently trebled by the court. The government had declined to intervene in the action, making it one of the largest FCA jury verdicts in a non-intervened case pursued by a whistleblower.

In its order vacating the jury verdict, the court emphasized the critical fact that the government has continued to pay claims and has not raised an objection to the alleged noncompliant acts despite knowing about the practices "long before this action began in 2011." Specifically, the court noted that Medicare conducted "routine audits" and had "knowledge of billing and documentation deficiencies," in spite of which the government continued to pay most claims. These facts proved problematic for the relator when revisited in light of the *Escobar* standard of materiality.

The court relied on *Escobar* to conclude that the theory of "implied false certification" cannot stand if the government continues to pay for the services notwithstanding actual knowledge of the noncompliance. Thus, to continue to pay claims without objection—when the government knew of the allegations contained in the complaint, the evidence gathered in the investigation and presented at trial, and the ultimate jury verdict for the relator—indicates that the noncompliance was not material to the government's decision to pay.

The court also highlighted that *Escobar's* "rigorous and demanding" standard for materiality precludes FCA claims based upon "minor or unsubstantial" or "garden-variety" breach of contract or regulatory violations. Accordingly, the relator's burden is twofold: it must show (1) that the government would have refused to pay had it known about the noncompliance, and (2) that the defendant knew this at the time of submission. To meet this burden, the relator may show how the government has behaved in comparable circumstances to establish that it would refuse payment upon gaining knowledge of noncompliance. Here, however, the record was devoid of such evidence.

The court rejected the relator's argument that "common sense" dictated a finding that the noncompliance was material to the government's decision to pay. The court distinguished *Escobar*—which involved a provider representing that its employees were fully qualified to provide certain mental health services when in fact they were not—from the present case—which was based on an inability by the nursing facilities to show that care plans and paperwork were properly maintained. Judge Merryday articulated the distinction, stating that "*actually not qualified* is decisively different from *fully qualified but not in possession of a certificate.*"

This ruling adds to the bevy of decisions finding that continued payment by the government when the government has knowledge of the noncompliance is fatal to FCA claims in light of *Escobar's* rigorous materiality standard. It comes on the heels

of a unanimous Fifth Circuit panel vacating a jury verdict of over \$663 million in *U.S. ex rel. Harman v. Trinity Industries, Inc. et al.* In that case, the jury found a violation of the FCA by the contractor for continuing to submit claims for reimbursement despite having changed the design of a highway guardrail without approval by the Federal Highway Administration (FHA). The Harman court found that the fact that the FHA always had and continued to reimburse for the alleged noncompliant guardrail, even after the jury verdict in that case, showed that the change in design was not material to the government's decision to pay.

These cases highlight the continued significant impact of *Escobar* as courts find FCA liability does not exist based on a determination that continued government payment in light of known noncompliance demonstrates that the noncompliance was not material to the government's payment decision. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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