

CLIENT ALERT

Not Better Late Than Never: Timing Requirement is Material to Payment

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On June 11, 2018, in *U.S. ex rel Prather v. Brookdale Senior Living Communities Inc.*, the Sixth Circuit reversed dismissal of a False Claims Act suit against the country's largest senior living provider because the relator had sufficiently alleged materiality. The *qui tam* suit was brought by a former nurse who alleged that physician certifications of patient need for home-health care were not signed until months after the care had been provided, in violation of 42 C.F.R. § 424.22 which requires that such certifications be completed at the time a plan of care is established or "as soon thereafter as possible."

Applying the factors that the Supreme Court identified in its *Escobar* decision, the Sixth Circuit held in a 2-1 decision that the relator sufficiently pleaded that the timing requirement in § 424.22 was material by alleging that it was an express condition of payment and referring to guidance documents suggesting that compliance with the timing requirement went to the "essence of the bargain" between the defendants and the government. Notably, the lower court had drawn a negative inference on materiality because the complaint contained no allegations about the government's past practice vis-à-vis claims that did not comply with the timing requirement in § 424.22. The Sixth Circuit found that this was "one step too far" because although past government actions are relevant to the materiality analysis, they are not dispositive.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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