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GOVERNMENT TRAPS, ZAPS AND ZINGERS

In an opinion loaded with linguistic hooks, the United States District Court for the Middle District of Florida recently reinforced the Supreme Court's holding in *Escobar,* enthusiastically highlighting the importance of materiality and scienter in FCA cases.

BACKGROUND

In *U.S. ex rel. Ruckh v. Salus Rehabilitation, LLC, et al.*, Relators were successful in a *qui tam* action against Defendants, who own and operate 53 specialized nursing facilities.[1] Relators brought their case based on a theory of upcoding and a failure to maintain care plans.[2] After Defendants received a verdict against them for almost $350 million, they moved for judgment as a matter of law and requested a new trial under Federal Rules of Civil Procedure 50 and 59, respectively.[3] Defendants argued that Relators failed to offer evidence of materiality as required by the United State Supreme Court's holding in *Universal Health Services, Inc. v. Escobar*.[4] Defendants also argued that Relators failed to prove that Defendants submitted claims for payment with knowledge that the governments would refuse to pay the claims had they known about the disputed practices.[5]

The Court granted Defendants' requests stating that the evidence shows 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."[6]

ANALYSIS

The Court's order emphatically states, "*Escobar* is the unquestionably controlling and guiding authority on materiality and scienter under the False Claims Act" and diligently examines key holdings from the Supreme Court's opinion.[7] The Court dramatically articulates *Escobar's* purpose, stating, "*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."[8]

This rejection of the system of "traps, zaps, and zingers" is accomplished through *Escobar's* requirement of materiality and scienter. Specifically, the False Claims Act requires the relator to prove *both* that a misrepresentation (or form of non-compliance) was material to the government's payment decision and that the defendant knew at the moment the defendant sought payment that the misrepresentation was material to the government's payment decision. Worded another way, a misrepresentation (or non-compliance) subjects a defendant to liability under the False Claims Act only if it is knowingly "material to the other party's course of action."[9]

In upholding the importance of this analysis, and examining what the government believes to be material, the Court stated, "…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…must prove that had the government known the facts the government would have refused to pay."[10] Stated more succinctly, the government's continued payment, despite knowledge of some claimed defect, evidences a lack of materiality.

Moving on from materiality and scienter, and tucked away near the end of the Court's order, is another holding beneficial to system-wide defendants of *qui tam* actions. The order holds that a "scattering of claims in a smattering of facilities is a wholly insufficient basis from which to infer the existence of a massive, authorized, cohesive, concerted, enduring, top-down, corporate scheme to defraud the government."[11]

PRACTICAL TAKEAWAYS

- The Supreme Court's holding in *Escobar* continues to be reinforced by various courts throughout the United States. Relators in FCA cases must prove both that a claimed defect was material to the government's payment and that the defendant knew that the claimed defect was material to the government's payment.
- The government's continued payment for goods and/or services, despite knowledge of some sort of non-compliance, strongly supports an argument that the non-compliance is not material to the government's payment decision.

- In actions against systems or corporations, cherry-picked evidence is insufficient to evidence the existence of system-wide or corporate schemes. There needs to exist some corporate knowledge with a directive relating to the submission of a specific false claim.

If you have any questions, please contact:

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[1] *Salus* at 1-2, 12.

[2] *Id*. at 1-2.

[3] *Id*. at 3.

[4] *Id*.

[5] *Id*. at 2, 4.

[6] *Id*.

[7] *Id*. at 4.

[8] *Id*. at 8.

[9] *Universal Health Services, Inc. v. Escobar*, 136 S. Ct. 1989, 2001 (2016).

[10] *Salus* at 19.

[11] *Id*. at 21.