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Eleventh Circuit Rules on FCA Materiality and Litigation Funding Agreements

By Matthew J. Oster*

The author of this article discusses a decision by the U.S. Court of Appeals for the Eleventh Circuit reinstating the majority of a $350 million jury verdict in a False Claims Act case.

The U.S. Court of Appeals for the Eleventh Circuit has issued an opinion in *Ruckh v. Salus Rehabilitation, LLC*, one of the largest False Claims Act ("FCA") cases in recent years—at least in terms of recovery—reinstating the majority of a massive $350 million jury verdict.[1] The decision weighs in on a number of key and emerging FCA issues, including materiality under *Escobar*[2] and relator standing.

While the decision is great news for relators and the government, the Eleventh Circuit's reasoning, especially with regard to *Escobar*, is less than clear and leaves much open to interpretation.

THE FACTS

To recap the facts briefly, a registered nurse and former employee of a skilled nursing facility in Florida brought a *qui tam* action alleging FCA violations based on fraudulent Medicare and Medicaid billing.[3] The relator claimed that several nursing facilities and other affiliated companies: (1) artificially inflated Medicare patients' Resource Utilization Group (RUG) scores using methods known as "upcoding" and "ramping" to yield increased Medicare payments, and (2) failed to maintain "comprehensive care plans" for Medicaid patients as required under Florida Medicaid rules, as part of a scheme to keep the cost of care for Medicaid patients down.[4]

After trial, a jury awarded a verdict that, with trebling and statutory penalties, approached $350 million dollars.[5] However, after the verdict, the

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[1] 963 F.3d 1089 (11th Cir. 2020).

[2] *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

[3] *See Ruckh*, 963 F.3d. at 1097–98.

[4] *Ibid.*

[5] *Id.* at 1098.

defendants filed a renewed motion for judgment as a matter of law arguing that the relator failed to provide evidence of materiality.[6] The district court agreed and threw out the verdict. The court reasoned that the allegations could not possibly be material because the government kept reimbursing the nursing facilities even after they were discovered.

THE ELEVENTH CIRCUIT DECISION

The Eleventh Circuit disagreed, at least in part. It held that relator presented sufficient evidence of materiality for her Medicare-based FCA claims, but not for her Medicaid-based claims. While the court did not expressly distinguish the two sets of claims, the key difference appears to be the nature of the fraud claims, and, specifically, whether the purported fraudulent scheme had a direct and "obvious" impact on the government's payments.[7]

The relator's Medicare fraud claims alleged two direct methods of fraud: upcoding and ramping. Generally speaking, upcoding is the act of elevating and exaggerating the type or amount of services provided, and ramping is the act of falsifying the timing of treatments to coincide with certain reimbursement periods. Both practices involve fraudulent reporting for the purpose of gaming and increasing the government's payments.

The district court had held that merely presenting evidence demonstrating that upcoding and ramping could have occurred was insufficient, and that, to establish materiality, a relator needed to show that the government was unwilling to make payments if it discovered these practices were occurring.[8] The Eleventh Circuit disagreed, although it did little to distinguish the district court's reasoning or tie its holding to *Escobar*. Instead, the court merely explained that upcoding is "a simple and direct theory of fraud," since the alleged fraud directly caused increased payments.[9]

That is, under the relator's theory, nursing facilities receive money from Medicare based on the services they provide, the nursing homes indicated they had provided more services than they actually provided, and Medicare therefore paid the nursing facilities higher amounts than they were truly owed. In light of that direct, causal relationship, the court found that the upcoded invoices

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[6] *Id.* at 1098–99.

[7] *Id.* at 1105.

[8] *Id.* at 1099.

[9] *Id.* at 1105.

had "plain and obvious materiality" and "went to the heart of the [nursing facilities'] ability to obtain reimbursement from Medicare."[10]

The court reached a similar conclusion with regard to ramping, observing that the practice "directly affects the payments Medicare makes to [nursing facilities]."[11] Thus, because the practice "goes to the essence of the parties' economic relationship," there was no need to show how the government treated discovery of misrepresentations.[12]

In turning to the relator's Medicaid claims, the Eleventh Circuit relied more heavily on *Escobar*'s materiality analysis and affirmed the district court's materiality decision. The relator's theory for that claim was based on failing to satisfy a condition of payment rather than manipulating the variables impacting the amount of the government's reimbursement. The relator's sole allegation was that the defendants failed to prepare and maintain comprehensive care plans for their residents, which are required as a condition of payment under 42 U.S.C. § 1396r(b)(2).[13]

But, aside from being a condition of payment, there was no evidence that the government would decline to pay claims if it learned that a nursing facility failed to prepare and maintain care plans.[14]

In fact, the evidence established at trial showed the opposite. The relator testified that when she informed her direct supervisors that her patient files lacked care plans, the nursing facility self-reported the deficiencies to the state.[15] However, there was no evidence that the state refused reimbursement or sought recoupment after this self-reporting as a result. Indeed, the relator did not provide any evidence that Florida ever declined payments or took any other enforcement action when it discovered these types of violations.[16] Thus, citing *Escobar*'s "demanding" materiality standard, the court held that, because there was no evidence Florida would refuse payment if it discovered the absence of a care plan, materiality was not sufficiently established.[17]

The takeaway from the court's holding seems to be this: for fraud claims alleging manipulation of variables that directly affect payments, materiality is

[10] *Ibid.*

[11] *Id.* at 1106.

[12] *Id.* at 1105.

[13] *Id.* at 1097, 1108.

[14] *Id.* at 1109.

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

"obvious" and evidence of materiality is established by the existence of those manipulative practices; however, for fraud claims merely alleging failure to comply with an indirect condition of payment, evidence of the government's behavior with regard to that condition is necessary.

The Eleventh Circuit also addressed an issue of standing that first arose on appeal: whether the relator forfeited her standing to pursue an appeal by entering into a litigation funding agreement that assigned a portion of any reinstated award to the funding company. The defendants argued that the assignment, which occurred after the trial, deprived the relator of standing because assignment was not permitted under the FCA or because the relator had diminished her Article III interest.

The Eleventh Circuit rejected defendants' arguments. It reasoned that the relator had assigned only a "small interest," which was insufficient to defeat Article III standing.[18] Under the terms of the litigation funding agreement, the relator assigned only four percent of any potential recovery to the company, the relator retained full authority over the litigation, and the company had no authority to control or influence the case.[19] This, the court reasoned, was insufficient to diminish the relator's interest below the minimum thresholds of Article III.[20]

Turning to the requirements of the FCA, the court reasoned that nothing in the statute expressly forbade assignment. By contrast, the FCA does contain a number of other restrictions on potential relators, including on the conduct of *qui tam* actions and who may serve as a relator. Given the numerous express exclusions contained in the FCA, the court declined to "engraft[] any further limitations onto the statute; that task is appropriately left for Congress."[21] The court further rejected the characterization of the funding company as an unqualified relator, given that it was not the one actively pursuing the claim as relator.[22] Thus, the relator enter into litigation funding agreements that assign a nominal portion of any future award without destroying their *qui tam* status.

While the defendants sought *en banc* rehearing on the standing issue, the Eleventh Circuit denied that request in August 2020.[23] Further, at the time of this publication, no party has filed a petition for certiorari in the U.S. Supreme

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[18] *Id.* at 1101.

[19] *Ibid.*

[20] *Id.* at 1101–02.

[21] *Id.* at 1102.

[22] *Ibid.*

[23] Order, *Ruckh v. Salus Rehabilitation, LLC*, No. 18-10500 (filed Aug. 27, 2020).

Court. Thus, for now in the Eleventh Circuit, it appears that relators may safely enter into litigation funding agreements.