SheppardMullin

11th Circ. Ruling Misinterprets FCA Materiality Standard

By David Douglass and Keeley McCarty

Law360, October 8, 2020, 5:18 PM EDT

In Ruckh v. Salus Rehabilitation LLC, the U.S. Court of Appeals for the Eleventh Circuit partially reversed U.S. District Judge Steven Merryday's 2018 "traps, zaps, and zingers" ruling, which overturned a $348 million False Claims Act jury verdict. The circuit court has since declined to review its decision en banc.

Following a month long trial in 2017, Merryday granted the defendants' motion for judgment as a matter of law, holding quite forcefully that the relator had not met the FCA's demanding materiality standard, articulated by the U.S. Supreme Court in Universal Health Services Inc. v. Escobar.[i]

In Ruckh,[ii] the Eleventh Circuit claimed to apply the same demanding standard in reversing the lower court's decision. But in its analysis of the Medicare-related fraud on which it reversed the lower court, the appeals panel failed to even mention the evidentiary record or how it supported materiality.

Instead, the appeals panel relied on a plain and obvious materiality standard apparently based on common sense more than evidence. In failing to analyze the evidence supporting or contradicting materiality, the Eleventh Circuit did not apply the rigorous approach that the Supreme Court established in Escobar.[iii]

The relator alleged that the defendants had caused Medicare and Medicaid to overpay on their claims for nursing home services through upcoding and ramping on Medicare claims, and failing to maintain care plans required by Medicaid regulations. The lower court decided there was insufficient evidence of materiality for both the Medicare and Medicaid claims.

The Eleventh Circuit reversed in part and reinstated the Medicare claims portion of the jury verdict, holding that a reasonable jury could have found fraudulent upcoding and ramping where the defendants claimed mere record-keeping deficiencies. It affirmed dismissal of the Medicaid claims.

In reaching its conclusion regarding the defendants' Medicare claims, the appeals panel reviewed the evidence of falsity in the case, but seemingly ignored the absence of evidence of materiality, instead stating simply that the falsities were material without even a reference to the record.

Regarding upcoding, the relator alleged that the defendants billed Medicare using codes that represented more treatment, both in duration and quality, than was reflected in the patients' medical records. If the defendants engaged in upcoding, the panel reasoned, then there was plain and obvious materiality to Medicare's decision to pay the claims because Medicare reimbursement rates were tied to the billing codes.

The Eleventh Circuit also held that the ramping the relator alleged would be material if true, "as

it goes to the essence of the parties' economic relationship." The panel declined to address Merryday's finding that the federal and Florida governments continued to pay the defendants' Medicare claims throughout litigation despite knowing of the fraud allegations, which the Supreme Court in Escobar described as very strong evidence against materiality.[iv]

Likewise, the panel did not reconcile what the lower court called an effectively barren record supporting materiality with the Supreme Court's instruction that "the common law could not have conceived of 'fraud' without proof of materiality."[v]

Nor did the panel analyze whether the upcoding and ramping underlying the Medicare allegations were substantial, despite the Supreme Court's admonition against materiality where noncompliance is minor or insubstantial.[vi]

With regard to the relator's allegations that the defendants failed to maintain care plans required by Medicaid, however, the Eleventh Circuit expressly detailed its analysis under Escobar's materiality standard. The panel held that the mere failure to maintain care plans, effectively a record-keeping deficiency, could not form the basis for FCA liability as a matter of law.

In contrast to its analysis of the Medicare claims, the panel considered that the defendant had disclosed the Medicaid record-keeping failure to the state, and the state had taken no action. Although the panel did not consider the state's inaction dispositive, it ultimately concluded that the relator had failed to present evidence sufficient to prove materiality under Escobar's demanding standard.

What accounts for the discrepancy in the Eleventh Circuit's scrutiny of materiality as applied to the Medicare claims versus the Medicaid claims? The Eleventh Circuit's decision suggests that regulatory or contractual noncompliance that directly affects the rates billed to the government is automatically material, regardless of evidence to the contrary — like continued payment by the government. After all, the Eleventh Circuit did not even bother mentioning the government knowledge defense in its analysis of materiality for the Medicare claims.

The flip side, of course, is that if the defendants' alleged noncompliance does not affect the rates charged to the government — as the defendants' failure to maintain Medicaid care plans did not — the relator must present some other evidence to meet the FCA's demanding materiality standard under Escobar.

This is not the materiality standard set out in Escobar. In using a plain and obvious materiality standard for the Medicare claims, the Eleventh Circuit ignored the Supreme Court's guidance against automatic materiality. Just as Escobar advised that labeling something a condition of payment was not dispositive of materiality, neither should the fact that some forms of noncompliance affect the rates charged to the government be the end of the materiality inquiry.

Escobar instead requires that relators and the government alike present evidence supporting materiality. This evidence should include proof that any noncompliance is not minor or insubstantial, and also proof of how the government typically handles such noncompliance. The Supreme Court set forth these rigorous requirements lest defendants be subject to treble damages for some garden-variety breach of contract.[vii]

It may be that the evidence in Ruckh demonstrates that defendants knowingly defrauded Medicare of millions of dollars, and the panel merely took a shortcut to that inevitable holding. But it is impossible to know based on the Eleventh Circuit's election not to rely on the record,

and the unfortunate precedential result is a materiality standard that changes color depending on the light.

---

[i] Universal Health Services Inc. v. U.S. ex rel. Escobar, 136 S. Ct. 1989 (2016).
[ii] Ruckh v. Salus Rehabilitation LLC, Case No. 18-10500 (Eleventh Cir. June 25, 2020).
[iii] Escobar, 136 S.Ct. at 2002.
[iv] Escobar, 136 S.Ct. at 2003.
[v] Id. at 2002.
[vi] Id. at 2003.
[vii] See Escobar, 136 S.Ct. at 2003, 2004.